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82-1795
No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

CAPITAL CITIES CABLE, INC.; COX CABLE OF OKLAHOMA CITY, INC.; MULTIMEDIA CABLEVISION, INC.; AND SAMMONS COMMUNICATIONS, INC.,
Petitioners,

v.

RICHARD A. CRISP, DIRECTOR, OKLAHOMA ALCOHOLIC BEVERAGE CONTROL BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a State, consistent with the protection of commercial speech under the First and Fourteenth Amendments, may adopt a sweeping ban on truthful, non-misleading advertising for a lawful product.

2. Whether a State, consistent with the First and Fourteenth Amendments, may prevent cable television operators from carrying out-of-state news and entertainment programs because those programs contain truthful, non-misleading advertising for wine.

PARTIES TO THE PROCEEDING BELOW

The following were parties to the proceeding (No. 82-1061) in the United States Court of Appeals for the Tenth Circuit: Cablecom-General, Inc. (now Capital Cities Cable, Inc.), Cox Cable of Oklahoma City, Inc., Multimedia Cablevision, Inc., and Sammons Communications, Inc., appellees, and Richard A. Crisp, Director, Oklahoma Alcoholic Beverage Control Board, appellant.*

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* Petitioners construe the terms "parent companies," "subsidiaries," and "affiliates" in Rule 28.1 of the Rules of this Court to mean those corporations (1) the shares of which are publicly traded; (2) in the case of "parent companies," which own a majority of the shares of a party; and (3) in the case of "subsidiaries" and "affiliates," a majority of the shares of which are owned by a party. With the terms so defined, petitioner Capital Cities Cable, Inc., has a parent company, Capital Cities Communications, Inc., and no subsidiaries or affiliates; petitioner Multimedia Cablevision, Inc., has a parent company, Multimedia, Inc., and no subsidiaries or affiliates; petitioner Cox Cable of Oklahoma City, Inc., has a parent company, Cox Communications, Inc., and no subsidiaries or affiliates; and petitioner Sammons Communications, Inc., has no parent, subsidiaries, or affiliates.

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RICHARD A. CRISP, DIRECTOR,
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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Capital Cities Cable, Inc. (formerly Cablecom-General, Inc.), Cox Cable of Oklahoma City, Inc., Multimedia Cablevision, Inc., and Sammons Communications, Inc. respectfully petition for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit to review that court's judgment of January 24, 1983, in *Cablecom-General, Inc. v. Crisp*, No. 82-1061, which was decided together with *Oklahoma Telecasters Association v. Crisp*, No. 82-1058, in a single opinion.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 699 F.2d 490 and appears as Appendix A to this petition. The opinion of the United States District Court for the Western District of

Oklahoma granting a preliminary injunction is not reported and appears as Appendix D to this petition. The district court's opinion on summary judgment is also not reported and appears as Appendix G to this petition.

JURISDICTION

The judgment of the court of appeals was entered on January 24, 1983. On March 21, 1983, the court of appeals denied a petition for rehearing filed by petitioners. Appendix B. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

This case involves the First, Fourteenth, and Twenty-first Amendments to the Constitution of the United States; Article 27, Section 5 of the Constitution of the State of Oklahoma; Section 516 of the Oklahoma Beverage Control Act, Okla. Stat. Ann. tit. 37, § 516; Section 111(c)(3) of the Copyright Act of 1976, 17 U.S.C. § 111(c)(3); and Section 76.55(b) of the rules of the Federal Communications Commission, 47 C.F.R. § 76.55(b). These provisions are set forth in Appendix H to this petition.

STATEMENT OF THE CASE

Petitioners operate cable television systems in the state of Oklahoma. Much of petitioners' cable service is composed of programming that originates outside Oklahoma and that is received by petitioners' systems—by means of antenna, microwave receiver, or satellite dish—and retransmitted by wire to their subscribers. II R. 8.[1] In some cases, petitioners' carriage of signals from out-of-state television stations is mandated by the Federal Communications Commission's so-called "must-carry"

[1] References to "I R. ——" and "II R. ——" are to Volumes 1 and 2 of the record in this matter on appeal in the United States Court of Appeals for the Tenth Circuit.

rules.[2] II R. 34-35, 52-55. Most of the out-of-state programming, however, is selected by the cable operators themselves, and it is this programming which typically furnishes the systems' primary appeal to subscribers. II R. 8, 10, 34. Out-of-state programming voluntarily carried by petitioners includes the signals of commercial television broadcast stations located in neighboring Kansas, Missouri, and Texas and the signals of so-called "super stations" located in such cities as Atlanta and Chicago.[3] II R. 32-33, 34-35, 53. This programming contains, from time to time, commercials for brands of wine. II R. 33, 39. The wine commercials are lawful under federal law and in the states where they originate. App. G at 41a. While it does not appear in the record, petitioners also provide advertiser-supported national cable programming services, such as the Cable News Network (CNN) and the USA Network, which also typically include wine commercials.[4]

The sale and consumption of alcoholic beverages are lawful in the state of Oklahoma. 699 F.2d at 500, App. A at 19a-20a; App. G at 42a. By statute and in its constitution, however, the state makes it unlawful "for any person, firm or corporation to advertise any alcoholic beverages or the sale of same within the State of Oklahoma, except one sign at the retail outlet bearing the words 'Retail Alcoholic Liquor Store.'" Oklahoma Alcoholic Beverage Control Act, Okla. Stat. Ann. tit. 37, § 516.[5] The act specifically defines wine as an alcoholic beverage within the scope of the advertising ban. *Id.* at

[2] 47 C.F.R. §§ 76.57-.61 (1982).

[3] A "super station" is an independent television station whose signal is relayed via statellite to cable systems beyond the normal reach of its over-the-air signal.

[4] Petitioners also offer subscribers the option of receiving, at an extra charge, certain so-called "pay" services, such as Home Box Office (HBO), that contain no advertising.

[5] *See also* Okla. Const. art. 27, § 5.

§ 506(3). The advertising of beer is permitted. 699 F.2d at 492, 502, App. A at 3a-4a, 23a.[6]

The liquor advertising ban has for some years been interpreted by the state to forbid Oklahoma broadcast television stations from broadcasting wine commercials as part of the national network programming they carry. In upholding this application of the ban, the Oklahoma Supreme Court relied heavily on its finding that television stations are able to delete wine commercials from the network programming. *Oklahoma Alcoholic Beverage Control Board v. Heublein Wines*, 566 P.2d 1158, 1160, 1162 (Okla. 1977).

At the same time, the Oklahoma Attorney General has construed the liquor advertising ban not to apply to advertisements appearing in newspapers, magazines and other publications printed outside Oklahoma, including publications specifically designed for circulation within the state.[7] Out-of-state publications may be delivered to Oklahoma subscribers and sold at outlets within the state even though they contain wine or liquor advertising. 699 F.2d at 493 n.1, 502, App. A at 5a, 23a-24a.

For many years, the state applied a similar policy to cable operators, and they were permitted to carry out-of-state programming containing wine commercials. 699 F.2d at 492, App. A. at 4a; App. G at 41a. In March 1980, however, the Oklahoma Attorney General issued an opinion stating that retransmission of such wine commercials by cable systems operating in Oklahoma would be considered in violation of state law. Op. Okla. Att'y

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[6] The state's definition of alcoholic beverages includes beer containing more than 3.2 percent alcohol by weight. Okla. Stat. Ann. tit. 37, § 506(3). However, because beer advertising does not generally specify alcoholic content, the advertising of beer generally is allowed. 699 F.2d at 492, App. A. at 3a-4a.

[7] *See, e.g.*, Op. Okla. Att'y Gen. No. 76-348 (November 24, 1976).

Gen. No. 79-334 (March 19, 1980). Respondent Richard Crisp, Director of the Oklahoma Alcoholic Beverage Control Board, notified all Oklahoma cable operators, including petitioners, that they faced imminent criminal prosecution if they continued to carry the out-of-state wine commercials. 699 F.2d at 492, App. A at 4a; App. G at 41a.

Cable television operators are prohibited by federal law from altering or modifying the content of the broadcast television signals, including commercials, that they carry to their subscribers. 699 F.2d at 492, App. A. at 4a; App. G. at 40a. Section 76.55(b) of the Federal Communications Commission's rules, 47 C.F.R. § 76.55(b) (1982), requires that broadcast television programming retransmitted by a cable system "shall be carried in full, without deletion or alteration of any portion." The Commission has specifically held that the section forbids the deletion of commercial messages.[8] Moreover, the Copyright Act of 1976 expressly prohibits cable systems operating under the statutory compulsory licensing system from willfully deleting a commercial advertisement from a television signal, subject to a minor exception not applicable here. 17 U.S.C. § 111(c)(3).[9]

Even if deletion of the out-of-state wine commercials were lawful, there would be, as the district court found here, "no feasible way for [petitioners] to block out the

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[8] *See Garland B. Pugh*, 68 F.C.C.2d 997, 999 (1978) ("Section 76.55(b) of the Rules . . . is meant to prohibit advertising deletions as well"); *WAPA-TV Broadcasting Corp.*, 59 F.C.C.2d 263, 272 (1976); *Notice of Proposed Rulemaking and Notice of Inquiry in Docket 18397*, 15 F.C.C.2d 417, 444 (1968).

[9] The Act permits, in certain circumstances, deletion of commercial advertising "by those engaged in television commercial advertising market research." 17 U.S.C. § 111(c)(3). The compulsory copyright license for cable operators was created by Congress because it was deemed infeasible for cable systems that carry the signals of numerous television stations to attempt to negotiate individual agreements with each of many different copyright owners for the right to carry every program broadcast by each station. *See* H.R. Rep. No. 1476, 94th Cong., 2d Sess. 89 (1976).

advertisements." App. G at 41a. Petitioners have no contractual relationship with the out-of-state television stations whose signals they carry, no control over the programming included in those signals by the stations, and no advance notice from the stations concerning the scheduling of wine commercials. App. G at 40a; II R. 38-40, 56-57. Petitioners' reception and retransmission of the broadcast television signals occur simultaneously. II R. 45. As a practical matter, therefore, even if it were lawful to do so, petitioners would be unable to delete each wine commercial in its entirety as it appears; even to attempt to delete the major part of each wine commercial would require an extremely burdensome and costly effort by petitioners to monitor each signal continuously. App. D at 29a; II R. 38-41, 45-46, 54-58.[10]

Petitioners would thus be compelled to discontinue their carriage of all signals from commercial television stations located outside Oklahoma if they were forbidden from retransmitting out-of-state wine commercials. This would deprive Oklahoma residents of access to the programming offered by the Atlanta, Chicago and other "super stations," as well as that provided by other, less distant stations whose signals are available to Oklahoma residents only by means of cable retransmission. The record indicates that some Oklahoma towns would receive no broadcast television signal at all if cable operators could not import signals from outside the state. II R. 55.

Failure to carry out-of-state signals would place some cable operators in violation of the Federal Communications Commission's "must-carry" rules, 47 C.F.R. §§ 76.57-.61 (1982), which require them to carry certain out-of-state signals to their subscribers. II R. 34-35, 52-55. Failure to transmit out-of-state signals would also in some cases

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[10] *See also Cable Television Report and Order*, 36 F.C.C.2d 143, 154-56, 165 (1972) (Commission rejects as unworkable its own proposal that would have required some cable systems to delete commercials from certain distant television signals).

be contrary to cable operators' franchise agreements with the communities they serve. App. G at 42a; II R. 55. Finally, by preventing their carriage of out-of-state broadcast signals, Oklahoma's ban on out-of-state wine commercials would deny cable operators the ability to offer much of their most popular programming. II R. 10, 34, 55. As the district court found, this would cause the operators a substantial loss in subscriber revenue, App. G at 42a, in some cases imperiling their financial viability. II R. 34.

District Court Proceedings

After being warned by state officials that they would be prosecuted if they continued to retransmit out-of-state wine commercials, petitioners brought an action on March 3, 1981, in United States District Court for the Western District of Oklahoma against respondent Richard Crisp in his official capacity as director of the Oklahoma Alcoholic Beverage Control Board. I R 1. Petitioners sought injunctive relief against application of Oklahoma's liquor advertising ban to their carriage of out-of-state wine commercials and programming containing such commercials and sought a declaratory judgment that such application would, *inter alia*, violate their rights to freedom of speech and press guaranteed by the First and Fourteenth Amendments to the United States Constitution.[11]

Following an evidentiary hearing, the district court on March 6, 1981, issued a preliminary injunction enjoining Crisp from enforcing the ban against petition-

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[11] Petitioners also alleged that enforcement of the liquor advertising ban against them would violate the Commerce and Supremacy Clauses of the United States Constitution, Articles I and VI, and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Federal jurisdiction was invoked under 28 U.S.C. §§ 1331, 1343, and 2201 and 42 U.S.C. § 1983.

ers' carriage of out-of-state wine commercials. Appendix D. On December 18, 1981, the district court entered summary judgment for petitioners and issued a permanent injunction. Appendices E, F.[12] An opinion supporting the orders was filed by the court on February 10, 1982. Appendix G.[13]

The district court found that the wine commercials carried by petitioners were not false or misleading and did not advocate unlawful activity, App. G at 47a, and held that they therefore were entitled to First Amendment protection under the decisions of this Court regarding commercial speech. *Id.* The court ruled that Oklahoma's "blanket suppression," *id.* at 49a, of this advertising violated the First Amendment, relying on *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), and other decisions of this Court for the proposition that in the area of commercial speech "the State cannot totally prohibit the dissemination of truthful information about a lawful activity." App. G at 46a.

The court rejected the contention that Oklahoma's power to regulate liquor under the Twenty-first Amendment superseded the requirements of the First Amendment. *Id.* at 45a-46a. The court also found that the liquor advertising ban failed to satisfy the requirements of *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), because it had been shown to serve only remotely and ineffectively, if at all,

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[12] On the same date, the district court awarded summary judgment and injunctive relief to a group of Oklahoma broadcast television stations that had brought a separate lawsuit challenging on First Amendment grounds the state's prohibition of their broadcast of wine commercials as part of their carriage of national network programming. *Oklahoma Telecasters Association v. Crisp*, No. Civ-81-439-W (W.D. Okla. December 18, 1981), *rev'd*, 699 F.2d 490 (10th Cir. 1983).

[13] The February 10 opinion replaced an opinion filed with the original orders. As the court of appeals noted, the opinions were "nearly identical." 699 F.2d at 493, App. A at 5a.

the state's asserted interests in temperance and discouragement of alcohol abuse. *Id.* at 48a. The court pointed out that enforcement of the ban against petitioners would merely prohibit them "from disseminating advertisements of something the public already knows from experience and from reading [out-of-state] newspaper and magazine advertising—that alcoholic beverages exist and are for sale at certain prices." *Id.* at 45a. The court also concluded that the ban was contrary to the Court's holding in *Central Hudson* because there existed alternative measures, such as educational programs, that could combat alcohol abuse more directly and effectively without infringement on First Amendment interests. *Id.* at 48a-49a.

Finally, the court found that enforcement of the Oklahoma laws against petitioners would effectively preclude them from carrying any out-of-state broadcast signals, since they are prevented by federal law from deleting the commercials, *id.* at 38a, and since "there exists no feasible way for [the operators] to block out the advertisements." *Id.* at 41a.[14]

The Decision Below

On appeal, the Tenth Circuit reversed, holding that enforcement of the Oklahoma liquor advertising ban against petitioners did not violate the First Amendment.[15]

The court of appeals concurred with the district court's conclusion that the wine advertisements carried by the cable operators concerned lawful activity, were

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[14] The court did not reach petitioners' other constitutional claims. App. G at 39a-40a.

[15] Petitioners' other constitutional claims were not addressed by the court of appeals. 699 F.2d at 493 n.1, App. A at 5a.

At the same time and with the same opinion, the court also reversed the district court's judgment for the broadcast plaintiffs in *Oklahoma Telecasters Association v. Crisp*, No. 82-1058, which had been consolidated with the cable operators' case for purposes of appeal.

not false or misleading, and therefore were "protected speech under the First Amendment." 699 F.2d at 500, App. A at 20a. Nevertheless, the Tenth Circuit sustained the ban, holding that this result was compelled by this Court's summary dismissal of the appeal in *Queensgate Investment Co. v. Liquor Control Commission*, 103 S.Ct. 31 (1982), decided after the district court's decision. *Queensgate* involved an appeal from a decision by the Ohio Supreme Court [16] that sustained as constitutional that state's partial ban on off-premises advertising of liquor prices by certain holders of liquor permits. Although the Tenth Circuit recognized that the Oklahoma restrictions "are indeed broader than the regulation in *Queensgate*," 699 F.2d at 497, App. A at 15a, it concluded that this Court's dismissal of the *Queensgate* appeal "mandate[d]" reversal of the district court decision. 699 F.2d at 502, App. A at 24a.

In addition to relying on *Queensgate*, the Tenth Circuit held that the Oklahoma ban should be sustained because of "the additional deference owed to the legislature as a result of the Twenty-first Amendment." 699 F.2d at 501, App. A at 22a. The court therefore did not require the state to justify its infringement of First Amendment rights by the usual stringent standard and upheld the Oklahoma restrictions after finding them "reasonably related to reducing the sale and consumption of [alcoholic] beverages and their attendant problems," 699 F.2d at 501, App. A at 22a, and "no more extensive than is necessary to serve Oklahoma's asserted interest." 699 F.2d at 502, App. A at 24a.

Although the court noted that cable television operators were precluded by federal law from deleting out-of-state wine commercials from the programming they carry, 699 F.2d at 492, App. A at 4a, and that they "especially are placed in a difficult position" by the liquor advertising ban, 699 F.2d at 502, App. A at 23a,

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[16] *Queensgate Investment Co. v. Liquor Control Commission*, 433 N.E.2d 138 (Ohio 1982).

the court did not explain how the state, consistent with the First Amendment, could effectively prohibit the carriage of out-of-state programming. Nor did the court indicate how cable programming could be distinguished in this respect from magazines and newspapers, which may be distributed in Oklahoma even though they contain liquor advertisements.

On March 21, 1983, the Tenth Circuit denied a petition for rehearing, Appendix B, and on April 4, 1983, under Rule 41(b) of the Federal Rules of Appellate Procedure, the court stayed its mandate for 30 days pending the filing of this petition. Appendix C.

REASONS FOR GRANTING THE WRIT

This case presents important First Amendment issues meriting this Court's review. The Tenth Circuit's decision, if not reversed, would permit the kind of sweeping ban on commercial speech that decisions of this Court have repeatedly condemned. The decision would also countenance an unprecedented state restriction on the press and on the interstate flow of information and ideas since the regulation at issue would effectively prevent cable television operators from carrying out-of-state advertiser-supported programming into Oklahoma.

I. THE COURT BELOW HAS DECIDED AN IMPORTANT CONSTITUTIONAL QUESTION CONCERNING THE PROTECTION OF COMMERCIAL SPEECH IN CONFLICT WITH DECISIONS OF THIS COURT AND CONTRARY TO THE OPINION OF ANOTHER CIRCUIT.

A. The Decision of the Court Below Upholds a Sweeping Ban On Truthful Advertising of a Lawful Product in Conflict With Decisions of This Court.

In upholding Oklahoma's ban on the advertising of alcoholic beverages, the decision below is in direct conflict with decisions of this Court holding that the First

Amendment bars states from prohibiting the dissemination of truthful, non-misleading information about a lawful product.[17]

While at one time decisions of this Court suggested that commercial speech was not constitutionally protected,[18] the Court has repeatedly held over the last decade that truthful advertising related to lawful products and activities is protected by the First Amendment.[19] It has emphasized the societal benefits in preserving a free flow of commercial information about goods and services, and has forcefully repudiated the "paternalistic" approach,[20] adopted below by the Tenth Circuit, that would permit states to protect their citizens against perceived dangers of lawfully available products by banning the dissemination of information about those products.[21]

Contrary to the decision below, this Court in recent years "has not approved a blanket ban on commercial speech unless the expression itself was flawed in some way, either because it was deceptive or related to unlawful activity." *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 566 n.9 (1980). It has struck down as unconstitutional prohibitions on advertising by lawyers, *Bates v. State Bar of*

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[17] *See, e.g., Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 505 (1981); *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 570-72 (1980); *id.* at 573-79 (Blackmun, J., concurring in judgment); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Carey v. Population Services International*, 431 U.S. 678, 700-02 (1977); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 773 (1976); *Bigelow v. Virginia*, 421 U.S. 809 (1975).

[18] *See, e.g., Valentine v. Chrestensen*, 316 U.S. 52 (1932).

[19] *See, e.g., In re R.M.J.*, 455 U.S. 191, 199 (1982).

[20] *Virginia State Board of Pharmacy*, 425 U.S. at 770.

[21] *See Central Hudson*, 447 U.S. at 561; *Bates*, 433 U.S. at 364; *Virginia State Board of Pharmacy*, 425 U.S. at 765.

Arizona, 433 U.S. 350 (1977);[22] on price advertising by pharmacists, *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976); on the advertising of abortion services, *Bigelow v. Virginia*, 421 U.S. 807 (1975); on the advertising of contraceptives, *Carey v. Population Services International*, 431 U.S. 678 (1977); and on promotional advertising by utilities, *Central Hudson Gas & Electric Corp. v. Public Services Commission*, 447 U.S. 557 (1980). As stated most recently in the plurality opinion in *Metromedia, Inc. v. City of San Diego*, 450 U.S. 490, 505 (1981):

> "A State may not completely suppress the dissemination of truthful information about an entirely lawful activity merely because it is fearful of that information's effect upon its disseminators and its recipients."[23]

The restriction on commercial speech upheld by the Tenth Circuit is precisely the sort of restriction this Court has repeatedly condemned. Oklahoma's liquor advertising ban is plainly not directed, or even claimed to be directed, at commercial speech that is false, deceptive or misleading.[24] Nor does the restricted commercial speech promote an unlawful product or activity; the sale and the consumption of liquor and wine are lawful in Oklahoma. The acknowledged purpose of the restriction is to discourage liquor sales and consumption by restricting the flow of commercial information about liquor to the citizens of the state, 699 F.2d at 500, App. A at 20a—in other words, to enforce the kind of "protection based . . .

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[22] *See also In re R.M.J., supra* (holding unconstitutional various restrictions on the content of lawyers' advertising).

[23] *See also Carey v. Population Services, Inc.*, 431 U.S. at 700; *Virginia State Board of Pharmacy*, 425 U.S. at 774.

[24] 699 F.2d at 500 n.8, App. A at 20a n.8. Both the district court and the court of appeals agreed that the specific advertisements at issue here—the out-of-state wine commercials—are truthful and non-misleading. 699 F.2d at 500, App. A at 20a; App. G at 47a.

on public ignorance," *Virginia State Board of Pharmacy*, 425 U.S. at 769, that this Court has forcefully rejected.[25]

This Court's summary dismissal of the appeal in *Queensgate Investment Co. v. Liquor Control Commission*, 103 S. Ct. 31 (1982), a decision relied on heavily by the Tenth Circuit below, is not to the contrary and is clearly distinguishable from the present case. This Court has emphasized that its summary dispositions should be narrowly interpreted to extend only to "the precise issues presented and necessarily decided . . . [and] should not be understood as breaking new ground." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). The Ohio regulation upheld in *Queensgate* forbade certain liquor permit holders from advertising off-premises the price of liquor per drink or per bottle and from comparing their retail prices to those of their competitors. *See Queensgate Investment Co. v. Liquor Control Commission*, 433 N.E. 2d 135, 139 n.1 (Ohio 1982). The permit holders were allowed, however, to advertise in any medium any other information about alcoholic beverages, including prices in the original containers, and manufacturers and distributors of alcoholic beverages were permitted to advertise their products without restriction. This is a far cry from Oklahoma's sweeping ban on liquor advertising, which even the Tenth Circuit recognized to be "indeed broader than

[25] As the district court found, the fostering of public ignorance in this area is contrary to the purposes of the First Amendment. App. G at 49a-50a. By informing consumers of the availability and nature of a lawful product, the wine commercials at issue here aid "the allocation of resources in a free enterprise system." *Bates v. State Bar of Arizona*, 433 U.S. at 364. In addition, just as the utility advertising for electrical products protected by this Court in *Central Hudson* could have the effect of promoting energy conservation by offering an alternative to less energy-efficient products, 447 U.S. at 570, so here, by presenting an alternative to hard liquor and spirits, wine commercials can promote moderation in the consumption of alcohol. *See, e.g.*, C. Burck, *Changing Habits in American Drinking*, Fortune, October 1976, at 159-60. The dissemination of such messages serves the interest of an informed public.

the regulation in *Queensgate*." 699 F.2d at 497, App. A. at 15a.[26]

The Tenth Circuit's decision also conflicts with decisions of this Court insofar as it holds that the First Amendment provides lesser protection when a state seeks to restrict liquor advertising under regulatory power conferred by the Twenty-first Amendment. 699 F.2d at 498, 501-02, App. A at 15a-17a, 22a, 24a. This Court has emphasized that the Twenty-first Amendment does not alter the standard of review under the First Amendment or other constitutional provisions protecting individual rights. *See Larkin v. Grendel's Den, Inc.*, 51 U.S.L.W. 4025, 4027 n.5 (U.S. December 13, 1982) ("The state may not exercise its power under the Twenty-first Amendment in a way which impinges upon the Establishment Clause of the First Amendment"); *Craig v. Boren*, 429 U.S. 190, 209 (1976) (the Twenty-first Amendment "does not alter the application of equal protection standards that otherwise govern this case"); *Wisconsin v. Con-*

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[26] The regulation approved in *Queensgate* involved only a restriction on advertising by the holders of liquor permits, and this Court has made clear that a state's power to impose conditions on the granting of liquor permits is greater than its power generally to regulate First Amendment activity. *See Craig v. Boren*, 429 U.S. 190, 209 (1976); *California v. LaRue*, 409 U.S. 109, 118 (1972) ("The critical fact is that California has not forbidden these performances across the board [but] has merely proscribed [them] to establishments that it licenses to sell liquor by the drink"). *See also New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 715 (1981). In this case, on the other hand, Oklahoma seeks to enforce its liquor advertising ban directly against the press. This Court held in *Bigelow v. Virginia*, 421 U.S. 809, 828 (1975), that a ban on advertising "incur[s] more serious First Amendment overtones" when applied against the press rather than the advertiser. *See also Lamar Outdoor Advertising, Inc. v. Mississippi State Tax Commission*, 701 F.2d 314, 330, *reh'g en banc ordered* (5th Cir. 1983) ("[A]pplication of [an advertising] regulation against liquor licensees raises different constitutional issues than enforcement of a subject matter ban against publishers and broadcasters").

stantineau, 400 U.S. 433, 436 (1971) (state's power to regulate liquor does not relax requirements of procedural due process).[27]

Finally, the decision below conflicts with this Court's assertion in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. at 564, that even a limited restriction on protected commercial speech "may not be sustained if it provides only ineffective or remote support for the government's purpose . . . [or] if the governmental interest could be served as well by a more limited restriction."[28] The record in this case contains no evidence that liquor advertising, in particular out-of-state commercials for brands of wine, contributes directly to alcohol abuse, or that the suppression of such commercials directly or effectively promotes temperance. App. G at 48a.[29] To the contrary, the district court found that Oklahoma's ban on such advertising serves the state's purposes in at most a remote, indirect and ineffective fashion. App. G at 45a, 48a. The district court also found that Oklahoma had failed to demonstrate the absence of alternative measures that could serve the goal of temperance as directly or effectively as the advertising ban without such adverse impact on First Amendment rights. App. G at 48a-49a.

The Tenth Circuit's decision in this case, if allowed to stand, is likely to have the effect of encouraging other

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[27] *See also California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 108 (1980) (Twenty-first Amendment does not "insulate" states from constitutional requirements).

[28] *See also In re R.M.J.*, 455 U.S. at 203.

[29] *See also* D. Pittman, *Primary Prevention of Alcohol Abuse and Alcoholism: An Evaluation of the Control of Consumption Policy* 18 (Social Science Institute of Washington University, 1981) ("[N]o scientific evidence exists that beverage alcohol advertising has any significant impact on the rate of alcohol abuse and alcoholism in American society"); R. Wilkinson, *The Prevention of Drinking Problems* 43-48, 132, 157 (1970).

states to adopt restrictions on the Oklahoma model. The questions presented are thus of substantial importance.

B. The Decision of the Court Below Is Contrary to the Opinion of Another Circuit.

The decision below is directly contrary to a recent opinion of a panel of the Fifth Circuit declaring a similar state ban on liquor advertising to be an unconstitutional infringement on commercial speech.[30] At issue was a Mississippi statute prohibiting liquor advertisements that originated within the state. The Fifth Circuit panel concluded that the statutory ban violated the First Amendment.

In doing so, the panel expressly rejected both the result reached by the Tenth Circuit in this case and the reasoning it employed. The panel found inapplicable the Supreme Court's summary dismissal of the appeal in *Queensgate Investment Co. v. Liquor Control Commission*, 103 S. Ct. 31 (1982), and specifically rejected the interpretation placed on *Queensgate* by the Tenth Circuit.[31] The panel also concluded, contrary to the Tenth Circuit, that the state's authority under the Twenty-first Amendment did not change the standard of review under the First Amendment.[32] And the panel found that Mississippi's ban on liquor advertising did not effectively promote the state's interest in controlling liquor consumption, relying principally on the fact that liquor commercials continued to enter the state through magazines and newspapers published outside Mississippi and through radio and television signals received directly by Missis-

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[30] *Lamar Outdoor Advertising, Inc. v. Mississippi State Tax Commission*, 701 F.2d 314, *reh'g en banc ordered* (5th Cir. March 11, 1983). *See also Dunagin v. City of Oxford*, 701 F.2d 335, *reh'g en banc ordered* (5th Cir. March 11, 1983) (applying and following *Lamar*).

[31] *See Lamar*, 701 F.2d at 331 n.23.

[32] *Id.* at 329-330.

sippi residents from stations outside the state.[33] A similar situation exists in Oklahoma, as found by the district court in the present case. App. G at 45a, 48a.

There is thus a clear inconsistency between the decision of the Tenth Circuit and the opinion of the Fifth Circuit panel. These important issues warrant review by this Court.[34]

II. THE COURT BELOW HAS DECIDED AN IMPORTANT CONSTITUTIONAL QUESTION CONCERNING THE PROTECTION OF NONCOMMERCIAL SPEECH IN CONFLICT WITH DECISIONS OF THIS COURT.

This case is also important because it is the first case to come before this Court involving the power of the states under the First Amendment to regulate the content of cable television programming. As the number of cable subscribing households has grown from 2.8 million in 1968 to more than 31 million today,[35] state and local governments have increasingly sought to play a role in the

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[33] *Id.* at 332-33. "When a state seeks to impose such a severe ban upon protected commercial speech, it must at least show that its law does some good." *Id.* at 333.

[34] Recognizing that their decisions produced a conflict between the circuits, the Fifth Circuit ordered rehearing en banc. *Lamar*, 701 F.2d at 316; *Dunagin*, 701 F.2d at 336. Under the rules of the Fifth Circuit, the effect of this action was to vacate the panel opinions and judgments. Vacation of the opinions does not necessarily deprive them of persuasive authority, both within the Fifth Circuit and without. *See, e.g., Straus Communications, Inc. v. FCC*, 530 F.2d 1001, 1008 n.16 (D.C. Cir. 1976) (*citing National Broadcasting Co., Inc. v. FCC*, 516 F.2d 1101, *vacated*, 516 F.2d 1180 (D.C. Cir. 1974), *cert. denied*, 424 U.S. 910 (1976)).

[35] *See Cable & Station Coverage Atlas* 18a (1982); Multichannel News, March 28, 1983, at 3. The current figure represents more than 37 percent of the nation's television households. *Id.*

regulation of cable program content. Such regulation raises vital First Amendment questions deeply affecting this increasingly important medium of communication.

The regulation at issue here would impose a particularly grave burden on the First Amendment rights of cable television operators and subscribers. The record in this case shows, and both the district court and the court of appeals found, that prohibition of petitioners' carriage of out-of-state wine commercials will effectively preclude petitioners from distributing not only those commercials, but the entire programming of out-of-state television signals, including news programs, editorials, documentaries, entertainment, and other expressions of ideas and information.[36]

As discussed above, the carriage of such programming will be effectively foreclosed because petitioners are prevented by federal law and by overwhelming technical and economic obstacles from deleting the wine commercials that are contained in the programming.[37] It is for these reasons that the district court found that petitioners' only "feasible" alternative, App. G at 39a, would be to drop entirely their carriage of out-of-state broadcast television programming. In fact, for some cable operators the only feasible alternative will be to cease operations entirely, since failure to carry out-of-state television signals will place them in violation of the Federal Communications Commission's "must-carry" rules. 47 C.F.R. § 76.57-.61. Other systems, no longer able to offer out-of-state broadcast signals, will lose subscriptions as a result and suffer severe, in some cases fatal, economic losses. App. G at 42a; II R. 34-35.[38] Although it does not appear in the

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[36] 699 F.2d at 492, App. A at 4a; App. G at 41a.

[37] *See* pages 5-6, *supra*.

[38] The state's imposition of such a debilitating economic burden on cable operators in itself raises important First Amendment

record, petitioners would also be effectively compelled to cease carrying national cable programming services containing wine commercials, such as the Cable News Network and the USA Network.[39]

There can be no doubt that cable television—like newspapers, broadcast television, and motion pictures[40]—is today "a significant medium for the communication of ideas . . . included within the free speech and free press guaranty of the First and Fourteenth Amendments." *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02

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concerns. *Compare Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973), in which this Court upheld municipal regulations on the format of a newspaper's advertising columns only after determining that the regulations did not "threate[n] [appellant's] financial viability, . . . impai[r] in any significant way its ability to publish and distribute its newspaper," or "endanger arguably protected speech." *Id.* at 383, 390. Such threats to critical First Amendment interests are plainly posed here. *See also Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936), in which this Court held that a state tax on the advertising revenue of newspapers having a circulation of 20,000 or more violated the First Amendment because of its tendency "to limit the circulation of information to which the public is entitled in virtue of the constitutional guarantees." *And see Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 51 U.S.L.W. 4315 (U.S. March 29, 1983) (state tax on publications' use of paper and ink violates First Amendment).

[39] While deletion of commercials from such national cable programming services would not violate federal law, it would be in violation of the cable operator's contract with the service provider, which customarily prohibits the removal of advertising. The providers of such programming also typically do not provide cable operators with prior notice concerning the scheduling and nature of commercials, so that the technical and economic impracticality of attempting to delete the commercials is the same as in the case of broadcast television signals. *See* pages 5-6, *supra*.

[40] *See Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (newspaper publishers); *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973) (broadcasters); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952) (motion pictures).

(1952). Courts which have reached the issue have recognized that the First Amendment protects both the programming carried by cable operators and the operators' editorial function in selecting that programming. *See, e.g., Midwest Video Corp. v. FCC*, 571 F.2d 1025, 1053-57 (8th Cir. 1978), *aff'd on other grounds*, 440 U.S. 689 (1979); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 43-51 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977).[41] While this Court has not explicitly addressed the question of cable operators' First Amendment status, it has recognized that cable operators exercise editorial discretion in choosing signals and services. *FCC v. Midwest Video Corp.*, 440 U.S. 689, 707 (1979); *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394, 410 (1974) (choice of broadcast signals by cable operators is a "creative function").

In exempting out-of-state publications from its liquor advertising ban, the state of Oklahoma has apparently recognized that it could not forbid the sale of the New York Times and the Wall Street Journal within the state because they contain wine advertising. Yet Oklahoma seeks to enforce a similar ban against cable operators who—like the Oklahoma distributors of the New York Times and the Wall Street Journal—must either offer the communication in its entirety, including wine advertisements, or forgo its distribution. Such regulation restricting the flow of information into the state is no less unconstitutional applied to cable operators than it would be if applied to newspaper distributors.

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[41] *See also Community Communications Co. v. City of Boulder*, 660 F.2d 1370, 1376 (10th Cir. 1981), *petition for cert. dismissed by agreement*, 102 S. Ct. 2287 (1982). *And see* Comment, *Access to Cable Television: A Critique of the Affirmative Duty Theory of the First Amendment*, 70 Cal. L. Rev. 1393 (1982); Note, *FCC Regulation of Cable Television Content*, 31 Rutgers L. Rev. 238 (1978); Note, *Cable Television and the First Amendment*, 71 Colum. L. Rev. 1008 (1971).

It is the fundamental purpose of the First Amendment, as applied to the states through the Fourteenth Amendment, to protect from governmental interference the national "free trade in ideas." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). To this end, the amendment is designed to ensure that information may flow freely across the country and that ideas originating in New York and New England may be made available to the citizens of Oklahoma and Mississippi. For an individual state to ban entirely an out-of-state communication because it contains objectionable advertising, when that advertising is neither misleading nor designed to encourage the consumption of an unlawful product, strikes at the very heart of the national commerce in ideas. No state, consistent with the First Amendment, may erect such barriers to the free flow of ideas or so "shield its citizens from information about activities outside [its] borders." *Bigelow v. Virginia*, 421 U.S. at 827-28.[42]

That the Oklahoma ban does not expressly forbid—and is not intended to forbid—the importation of all out-of-state signals does not rescue the regulation when so substantial an "effect on the exercise of First Amendment rights arises . . . as an unintended but inevitable result of the government's conduct." *Buckley v. Valeo*, 424 U.S. 1, 65 (1976) (per curiam). *See also Elrod v. Burns*, 427 U.S. 347, 362 (1976); *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293, 297 (1961) ("[R]egulatory measures . . . cannot be employed in purpose *or in effect* to stifle, penalize, or curb the exercise of First Amendment

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[42] *See also Board of Education v. Pico*, 50 U.S.L.W. 4831, 4835 (U.S. June 25, 1982) ("'[A] State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge'") (quoting *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965)); *Epperson v. Arkansas*, 393 U.S. 97 (1968); *New York Times v. Sullivan*, 376 U.S. 254 (1964); *Martin v. City of Struthers*, 319 U.S. 141, 146-47 (1943).

rights") (emphasis added); *NAACP v. Alabama*, 357 U.S. 449, 460-61 (1958).[43]

Nor is the regulation saved because it is directed at commercial speech, even if the advertising in question were itself unprotected by the First Amendment.[44] The decision below is directly contrary to decisions of this Court holding that a state may not prevent the dissemination of protected speech on the ground that it includes some suppressible commercial material or activity. Thus, in *Jamison v. Texas*, 318 U.S. 413 (1943), the Court reversed the conviction of a Jehovah's Witness for distributing religious handbills that included an advertisement for a religious publication. Noting that states then could generally "prohibit the use of the streets for the distribution of purely commercial leaflets," *id.* at 417, the Court nevertheless held that "[t]he mere presence of an advertisement" on a handbill furthering religious activity "may not subject the distribution of the handbill to prohibition." *Id.* at 416.[45] In *In re Primus*, 436 U.S. 412

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[43] This Court has repeatedly struck down regulations that substantially restricted important avenues or media of expression, notwithstanding that the purpose of the regulation was unrelated to the content of the speech. *See, e.g., Saia v. New York*, 334 U.S. 558 (1948) (sound trucks); *Martin v. City of Struthers, supra* (door-to-door solicitation); *Schneider v. State*, 308 U.S. 147 (1939) (leafletting). *See also* Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 Yale L.J. 1205, 1335-36 (1970) ("The state is obligated to protect the channels of communication, even if it takes a special exception and some sacrifice of the state's expression-unconnected interest"). And the Court has viewed with particular alarm regulations that would have the effect, if not the aim, of curtailing the press' ability freely to disseminate information of its choosing. *See, e.g., Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974); *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973); *New York Times v. Sullivan*, 376 U.S. 254 (1964); *Grosjean v. American Press Co.*, 297 U.S. 233 (1936).

[44] *But see* Section I, *supra*.

[45] *See also Murdock v. Pennsylvania*, 319 U.S. 105 (1943). *Compare Valentine v. Chrestensen*, 316 U.S. 52 (1942), in which this

[Footnote continued]

(1978), the Court held that a ban on in-person solicitation by lawyers—generally a permissible restraint on commercial speech [46]—could not be applied to solicitation by a lawyer for the American Civil Liberties Union because it threatened the effectiveness of the ACLU "as a vehicle for effective political expression and association," *id.* at 431, and thus implicated not only commercial speech but also "core First Amendment rights." *Id.*[47]

If allowed to stand, the Tenth Circuit's decision in this case will permit the state of Oklahoma to severely abridge First Amendment rights by restricting the flow of ideas and information into the state and by curtailing the ability of cable operators to select the programming they carry. The case is of great importance to the future of cable television, an increasingly vital medium in the dissemination of news and information in this country. And here, as in *Bigelow v. Virginia*, 421 U.S. 809 (1975):

> "If application of this statute were upheld under these circumstances, [the state] might exert the power sought here over a wide variety of national publications or interstate newspapers carrying advertisements similar to the one [at issue] . . . .

Court held that a distributor of handbills composed primarily of commercial advertising could not escape a municipal ban on commercial leafletting by affixing a civic protest to the advertising "with the intent, and for the purpose, of evading the prohibition." *Id.* at 55. There can, of course, be no suggestion in this case that the cable operators carry protected programming in addition to wine commercials in an effort to avoid Oklahoma's ban on liquor advertising.

[46] *See Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978).

[47] Similarly, this Court has struck down state regulations aimed at unprotected obscenity or libel when their impact would extend more broadly to restrict the dissemination of protected ideas. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254, 278-79 (1964); *Smith v. California*, 361 U.S. 147, 151 (1959); *Stanley v. Georgia*, 394 U.S. 557 (1969). *See also Butler v. Michigan*, 352 U.S. 380 (1957).

Other States might do the same. The burdens thereby imposed on publications would impair, perhaps severely, their proper functioning." *Id.* at 828-29 (footnotes omitted).

These critical questions require review by this Court.

CONCLUSION

For the reasons stated above, a writ of certiorari should be granted to review the judgment of the United States Court of Appeals for the Tenth Circuit.

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May 3, 1983

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APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 82-1058, 82-1061

OKLAHOMA TELECASTERS ASSOCIATION, an unincorporated association; COMBINED COMMUNICATIONS CORPORATION OF OKLAHOMA, INC., an Oklahoma corporation; GRIFFIN TELEVISION, INC., an Oklahoma corporation; KTVY, INC., an Oklahoma corporation; KTUL-TV, INC., an Oklahoma corporation; KOTV, INC., an Oklahoma corporation; SCRIPPS-HOWARD BROADCASTING CO., an Ohio corporation; GOLDEN WEST BROADCASTERS OF OKLAHOMA, INC., an Oklahoma corporation; BLAIR BROADCASTING OF OKLAHOMA, INC., an Oklahoma corporation; EASTERN OKLAHOMA TELEVISION CO., INC., an Oklahoma corporation; SERAPHIM CORP., an Oklahoma corporation; KOKI-TV, an Oklahoma partnership; and TULSA TV 41, a joint venture,

Plaintiffs-Appellees,

v.

RICHARD A. CRISP, Director,
Alcoholic Beverage Control Board,

Defendant-Appellant.

CABLECOM-GENERAL, INC.; COX CABLE OF OKLAHOMA CITY, INC.; MULTIMEDIA CABLEVISION, INC.; and SAMMONS COMMUNICATIONS, INC.,

Plaintiffs-Appellees,

v.

RICHARD A. CRISP, Director,
Alcoholic Beverage Control Board,

Defendant-Appellant.

Jan. 24, 1983

Robert D. Nelon, Oklahoma City, Okl. (Roy J. Davis, L. Gene Gist and Nancy M. Thompson, Oklahoma City, Okl., with him on the brief), of Andrews Davis Legg Bixler Milsten & Murrah, Oklahoma City, Okl., for plaintiffs-appellees Oklahoma Telecasters Ass'n, et al.

Clyde A. Muchmore, Oklahoma City, Okl. (Richard C. Ford, Oklahoma City, Okl., with him on the brief), of Crowe & Dunlevy, Oklahoma City, Okl., for Cablecom-General, Inc. (John D. Matthews, David P. Fleming and J. Christopher Redding of Dow, Lohnes & Albertson, Washington, D.C., for Cox Cable of Oklahoma City, Inc., Multimedia Cablevision, Inc., and Sammons Communications, Inc., with them on the brief), in No. 82-1061.

Gary W. Gardenhire, Asst. Atty. Gen., Okl., Oklahoma City, Okl. (Jan Eric Cartwright, Atty. Gen. of Okl., Oklahoma City, Okl.), for defendant-appellant.

Jerry D. Sokolosky, Oklahoma City, Okl., filed an amicus curiae brief for Oklahoma Press Ass'n and Outdoor Advertising Ass'n of Okl.

Larry Derryberry of Derryberry Duncan & Gray, Oklahoma City, Okl., filed an amicus curiae brief for S.A.N.E., Inc.

Bill Allain, Atty. Gen. of Miss., and Peter M. Stockett, Asst. Atty. Gen. of Miss., Jackson, Miss. (W. Timothy Jones and John E. Milner of Brunini, Grantham, Grower & Hewes, Jackson, Miss., of counsel), filed an amicus curiae brief for the State of Miss.

Before BARRETT, McKAY and LOGAN, Circuit Judges.

BARRETT, Circuit Judge.

Richard A. Crisp (Crisp) appeals from two summary judgments declaring that certain provisions of Okla-

homa's constitution and statutes violate the First and Fourteenth Amendments of the United States Constitution. The appeals were consolidated pursuant to Fed.R. App.P. 3(b).

Appellee in No. 82-1058, Oklahoma Telecasters Association (Telecasters), is an unincorporated association of corporations and partnerships engaged in the business of television broadcasting in the State of Oklahoma. Appellees in No. 82-1061 are holders of cable television franchises in the State of Oklahoma and will be referred to as the "cable operators". Appellant, Crisp, is the former director of the Oklahoma Alcoholic Beverage Control Board, an agency charged with primary responsibility for the enforcement of Oklahoma laws regulating the sale and consumption of alcoholic beverages.

The Oklahoma Constitution stringently restricts the advertising of alcoholic beverages:

> It shall be unlawful for any person, firm or corporation to advertise the sale of alcoholic beverage within the State of Oklahoma, except one sign at the retail outlet bearing the words "Retail Alcoholic Liquor Store."

Okla. Const. art. XXVII, § 5. The Oklahoma Alcoholic Beverage Control Act similarly prohibits the advertising of "alcoholic beverages or the sale of the same within the State of Oklahoma," except by strictly regulated on-premises signs. Okla.Stat. Ann. tit. 37, § 516 (West Supp.1982). That act defines "alcoholic beverage" as "alcohol, spirits, beer, and wine. . . ." Okla.Stat. Ann. tit. 37, § 506(2) (West Supp. 1982). The definition of "beer" only includes beverages "containing more than three and two-tenths percent (3.2%) of alcohol by weight. . . ." Okla.Stat.Ann. tit. 37, § 506(3) (West Supp.1982). Since beer can contain 3.2% alcohol or less, the advertising of beer generally is allowed. The ad-

vertising of wine and other alcoholic beverages within the state, however, is prohibited.

The members of Telecasters rebroadcast network programming that includes advertisements for wine. Although such advertising is lawful where it originates, and in most states where rebroadcast occurs, the members of Telecasters are required to "block out" network advertising of wine. If Telecasters' members fail to do so, or if they solicit or accept advertisements for alcoholic beverages, they are subject to criminal prosecution by complaint of the Alcoholic Beverage Control Board.

The cable operators also are prohibited from soliciting or accepting advertising for alcoholic beverages. For many years, however, the cable operators have been allowed to relay programming from out-of-state television stations that included advertisements for wine. In fact, Federal Communication Commission regulations and federal copyright law prohibit cable operators from altering or modifying the television signals, including advertisements, they relay to subscribers. *See* 17 U.S.C. § 111 (c)(3) (1976) and 47 C.F.R. § 76.55(b) (1981). Despite those federal requirements, the Attorney General of the state of Oklahoma on May 19, 1980, issued an opinion declaring that the prohibitions against alcoholic beverage advertising apply to cable television in the same manner as they apply to broadcast television. Pursuant to that opinion, Crisp notified the cable operators that the wine commercials they had been relaying were illegal, and threatened the operators with criminal prosecution if they continued to relay such commercials.

Telecasters and the cable operators filed separate suits against Crisp, in his official capacity, in the United States District Court for the Western District of Oklahoma. Pursuant to 28 U.S.C. § 2201 (Supp. IV 1980), both plaintiffs asked the court to render a declaratory judgment that Oklahoma's laws, Okla. Const., art. XXVII, § 5, and Okla.Stat.Ann. tit. 37, § 516, *supra*, vio-

lated their rights to free speech, guaranteed by the First and Fourteenth Amendments, and equal protection, guaranteed by the Fourteenth Amendment.[1] In addition, the cable operators requested and received a preliminary injunction, and both plaintiffs sought permanent injunctions, prohibiting Crisp from enforcing the constitutional and statutory prohibitions against them.

Both the cable operators and Telecasters filed motions for summary judgment under Fed.R.Civ.P. 56. Crisp filed motions to dismiss pursuant to Fed.R.Civ.P. 12(b)(6). On December 18, 1981, the district court filed nearly identical memorandum opinions and orders in the two cases, granting Telecasters' and the cable operators' motions for summary judgment, and denying Crisp's motions to dismiss.

In both opinions the district court ruled that the power to regulate liquor granted to the states by the Twenty-first Amendment to the United States Constitution did not override the First Amendment rights of Telecasters and the cable operators. The court then applied the four part analysis the Supreme Court prescribed in *Central Hudson Gas and Electric Corp. v. Public Service Commission*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), for determining the validity of the regulation of "commercial speech". That analysis can be summarized as follows: (1) is the commercial speech protected by the First Amendment: that is, does it concern lawful activity and is it not misleading; (2) is the asserted governmental interest substantial; (3) does the regulation directly advance the governmental interest asserted; (4) is the regulation more extensive than

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[1] The equal protection claim was based on the inconsistency between the treatment of the broadcast versus the printed media: newspapers and magazines published outside of Oklahoma, but circulated within the state, are permitted to carry advertisements of alcoholic beverages. The trial court did not reach the issue of equal protection and it is not before us in these appeals.

is necessary to serve the governmental interest? *Id.* at 566, 100 S.Ct. at 2351.

The district court concluded that Oklahoma's laws only indirectly advanced the stated governmental interest in reducing alcohol consumption and its related problems, and were more extensive than necessary to serve that interest. The court therefore entered declaratory judgments stating that enforcement of the advertising does or would violate the plaintiffs' First Amendment rights, as guaranteed by the Fourteenth Amendment. The court also entered permanent injunctions against Crisp, preventing him, or the Alcoholic Beverage Control Board, from enforcing the laws against the plaintiffs.

On January 11, 1982, Crisp timely filed a notice of appeal with this court. On February 10, 1982, the district court entered an order withdrawing its December 18, 1981, opinions, and filed *nunc pro tunc* memorandum opinions in lieu thereof, supplementing and amplifying its views with respect to the granting of summary judgments. The substituted opinions did not alter the court's reasoning or conclusions in any material way; the December and February opinions are nearly identical. Crisp moved to strike the substituted opinions. The district court overruled the motion in *Cablecom*, but entered no order in *Telecasters*.

Crisp then moved the trial court to stay the permanent injunctions pursuant to Fed.R.Civ.P. 62(c). The trial court denied the motion on May 19, 1982. On October 4, 1982, the Supreme Court dismissed for want of a substantial federal question the appeal in *Queensgate Investment Co. v. Liquor Control Commission*, —— U.S. ——, 103 S.Ct. 31, 74 L.Ed.2d 45 (1982). In that case the Ohio Supreme Court had upheld against a First Amendment challenge a state regulation which prohibited retail liquor permit holders from advertising the retail price of alcoholic beverages.

Based on the *Queensgate* dismissal, Crisp on November 4, 1982, again moved the district court to suspend the injunctions under Fed.R.Civ.P. 62(c). The district court was unable to hear the motions prior to November 15, when the appeals were scheduled for oral argument. On November 9, therefore, Crisp applied to this court under Fed.R.App.P. 8(a) for an order suspending the injunctions during the pendency of the appeals. At the commencement of oral argument on November 15, 1982, we denied that application.

In his briefs, Crisp raises numerous contentions of error, including the propriety of the trial court's summary judgments and *nunc pro tunc* opinions, the denial of Crisp's request for a hearing on his motion to stay the injunctions, and the trial court's application of the *Central Hudson* analysis. At oral argument, however, Crisp emphasized the importance of the *Queensgate* dismissal. We agree that the application of that case is the critical issue in this appeal. Thus, we will first address that issue.

I.

In *Queensgate Investment Co. v. Liquor Control Commission*, 69 Ohio St.2d 361, 433 N.E.2d 138 (1982), the appellant, Queensgate Investment Co. (Queensgate), was a holder of an Ohio liquor permit who was prosecuted for the violation of certain regulations of the Ohio Liquor Control Commission. The regulations in question prohibited off-premises price advertising by holders of certain liquor permits.[2] The Commission rendered an order

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[2] The regulations provided, in pertinent part:

> No alcoholic beverages shall be advertised in Ohio except in the manner set forth in 4301:1-1-03 and as hereinafter provided.
>
> (A) As to advertising on the premises, holders of Class C, D, and G permits shall not advertise the price per bottle or drink of any alcoholic beverage, or in any manner refer to price

suspending Queensgate's license for one week for the violation of the regulation. Queensgate appealed on several grounds, including a contention that the regulation was an unconstitutional restraint on its First Amendment right to engage in commercial speech.

The Ohio Supreme Court applied the analysis articulated in *Central Hudson*, *supra*, and held that the regulation did not violate the First Amendment. The court first held that the speech was protected and that the asserted governmental interest, that of discouraging the excessive consumption of alcoholic beverages, was substantial and was well within the powers granted to the states under the Twenty-first Amendment. The court then held that since it was directed at controlling alcoholic beverages, not speech, the regulation did directly advance the governmental interest. Finally, the court held that the advertising of drink prices and price advantages would encourage the excessive consumption of alcoholic beverages; thus, the prohibition against such advertising was the narrowest method available to prevent such excessive consumption. *Queensgate*, *supra* at 69 Ohio St.2d 365-67, 433 N.E.2d 138.

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or price advantage except within their premises and in a manner not visible from the outside of said premises.

(B) Manufacturers and distributors of alcoholic beverages are permitted to advertise their products in Ohio.

Holders of Class C, D, and G permits shall be authorized to advertise in newspapers of general circulation, radio and television, on bill boards, calendars, in or on public conveyances and in regularly published magazines. Advertising may include the retail price of the original container or packages, but such advertising may not in any manner refer to price advantage.

Subsequent enactment of law by the 102nd Ohio General Assembly prohibits the advertising of the retail price of beer in any media. See page 6, Section 4301.211 of the Revised Code of Ohio.

Ohio Adm. Code 4301:1-1-44. *See Queensgate*, *supra* at 69 Ohio St.2d 361-62 n. 1, 433 N.E.2d 138.

Queensgate filed a timely appeal in the United States Supreme Court. The only issue it raised there was whether the regulation violated the "First and Fourteenth Amendments of the Constitution of the United States by suppressing the public dissemination of truthful information about a lawful activity." Jurisdictional Statement at I, *Queensgate Investment Co. v. Liquor Control Commission*, —— U.S. ——, 103 S.Ct. 31, 74 L.Ed.2d 45. The Liquor Control Commission filed with the Supreme Court a motion to dismiss the appeal on the ground that the question was so unsubstantial as not to warrant further argument. The basis for the motion was that an advertising prohibition was well within the scope of a state's powers under the Twenty-first Amendment, which permits a state to totally ban the sale of liquor, or otherwise "minimize its evils".

On October 4, 1982, the Supreme Court dismissed the appeal "for want of a substantial federal question."[3] *Queensgate Investment Co. v. Liquor Control Commission*, —— U.S. ——, 103 S.Ct. 31, 74 L.Ed.2d 45 (1982). Thus, we must now determine what precedential weight to ascribe to that dismissal in deciding the present appeal.

II.

The seminal case on the precedential effect of summary dispositions by the Supreme Court is *Hicks v. Miranda*, 422 U.S. 332, 95 S.Ct. 2281, 45 L.Ed.2d 223 (1975). In that case the Court was faced with the problem of the distinction between its appellate jurisdiction and its certiorari jurisdiction. Under 28 U.S.C. § 1257

[3] The rules of the Supreme Court require a jurisdictional statement which includes "[a] statement of the reasons why the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution." Sup.Ct.R. 15(1)(h). Rule 16 allows the appellee to file a motion to dismiss an "appeal from a state court on the ground that it does not present a substantial federal question. . . ." Sup.Ct.R. 16(1)(b).

(2) (1976), final judgments of the highest court of a state may be reviewed by the Supreme Court: "By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution . . . of the United States, and the decision is in favor of its validity." Unlike certiorari jurisdiction, which is discretionary, the Court's appellate jurisdiction is mandatory. *Hicks, supra* at 344, 95 S.Ct. at 2289.[4] Thus, when a case comes before it on appeal, the Supreme Court is "not obligated to grant the case plenary consideration . . . but [it is] required to deal with its merits." *Id.*

The Court in *Hicks* therefore ruled that a summary dismissal of an appeal for want of a substantial federal question is a decision on the merits of the case. Such a summary disposition is binding on the lower federal courts, at least where substantially similar issues are presented, until doctrinal developments or direct decisions by the Supreme Court indicate otherwise. *Id.* at 344-45, 95 S.Ct. at 2289-90.

Although the *Hicks* decision has been criticized for a variety of reasons,[5] since that decision the Supreme Court

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[4] *See also* Sup.Ct.R. 17(1) ("A review on a writ of certiorari is not a matter of right, but of judicial discretion . . ."); 16 Wright, Miller, Cooper & Gressman, Federal Practice and Procedure §§ 4003, 4004 & 4011 (1977).

[5] Mr. Justice Brennan has criticized the rule as giving too much weight to a summary decision made solely on a jurisdictional statement, for a variety of reasons which are not explained in any sort of opinion. *See Sidle v. Majors*, 429 U.S. 945, 97 S.Ct. 366, 50 L.Ed.2d 316 (1976) (Brennan, J., dissenting from denial of certiorari); *Colorado Springs Amusements, Ltd. v. Rizzo*, 428 U.S. 913, 96 S.Ct. 3228, 49 L.Ed.2d 1222 (1976) (Brennan, J., dissenting from denial of certiorari). Sitting by designation in the Fourth Circuit, Justice Clark stated that the *Hicks* rule "fl[ew] in the face" of what he perceived to be the Court's actual practice of according similar treatment and precedential weight to appeals from state courts and petitions for certiorari. 526 F.2d 833, 836 (4th Cir. 1975) (Clark, J., concurring), *cert. denied*, 428 U.S. 913, 96 S.Ct. 3228, 49 L.Ed.2d 1221 (1976).

has consistently stated that summary dispositions—summary affirmances and summary dismissals for want of a substantial federal question—are decisions on the merits and are binding on the lower federal courts.[6] The Court has refined the rule by emphasizing that a summary disposition only upholds the judgment of the lower court; "[i]t does not . . . necessarily reflect [the Court's] agreement with the opinion of the court whose judgment is appealed." *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 477 n. 20, 99 S.Ct. 740, 749 n. 20, 58 L.Ed.2d 740 (1979); *See also Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 182-83, 99 S.Ct. 983, 989-90, 49 L.Ed.2d 230 (1979); *Mandel v. Bradley*, 432 U.S. 173, 176, 97 S.Ct. 2238, 2240, 53 L.Ed.2d 199 (1977) (per curiam).

It has also become clear that while summary dispositions are rulings on the merits, their precedential effect is limited to the precise issues set forth in the jurisdictional statement:

> Summary affirmances and dismissals for want of a substantial federal question without doubt reject the specific challenges presented in the statement of jurisdiction and do leave undisturbed the judgment appealed from. They do prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions. . . .

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[6] *See Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 499-500, 101 S.Ct. 2882, 2888-2889, 69 L.Ed.2d 800 (1981) (plurality opinion); *Southern Railway Co. v. Seaboard Allied Milling Corp.*, 442 U.S. 444, 462, 99 S.Ct. 2388, 2398, 60 L.Ed.2d 1017 (1979); *Caban v. Mohammed*, 441 U.S. 380, 390 n. 9, 99 S.Ct. 1760, 1767 n. 9, 60 L.Ed.2d 297 (1979); *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 477 n. 20, 99 S.Ct. 740, 749 n. 20, 58 L.Ed.2d 740 (1979); *Mandel v. Bradley*, 432 U.S. 173, 176, 97 S.Ct. 2238, 2240, 53 L.Ed.2d 199 (1977) (per curiam); *Tully v. Griffin, Inc.*, 429 U.S. 68, 74, 97 S.Ct. 219, 223, 50 L.Ed.2d 227 (1976).

> Summary actions, however, . . . should not be understood as breaking new ground but as applying principles established by prior decisions to the particular facts involved.

Mandel, supra at 176, 97 S.Ct. at 2240. *See also Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 499, 101 S.Ct. 2882, 2887, 69 L.Ed.2d 800 (1981); *Illinois State Board of Elections, supra* 440 U.S. at 182-83, 99 S.Ct. at 989-90; *Yakima Indian Nation, supra* 439 U.S. at 477 n. 20, 99 S.Ct. at 749. Moreover, although lower federal courts are bound by summary dismissals, they carry less precedential weight in the Supreme Court than opinions rendered after plenary consideration by that Court. *Metromedia, supra* 453 U.S. at 500, 101 S.Ct. at 2889; *Caban v. Mohammed*, 441 U.S. 380, 390 n. 9, 99 S.Ct. 1760, 1767 n. 9, 60 L.Ed.2d 297 (1979); *Yakima Indian Nation, supra* 439 U.S. at 477 n. 20, 99 S.Ct. at 749 n. 20; *Tully v. Griffin, Inc.*, 429 U.S. 68, 74-75, 97 S.Ct. 219, 223-224, 50 L.Ed.2d 227 (1976). In fact, "[i]t is not at all unusual for the Court to find it appropriate to give full consideration to a question that has been the subject of previous summary action." *Yakima Indian Nation, supra* 439 U.S. at 477 n. 20, 99 S.Ct. at 749 n. 20. *See, e.g., Caban, supra* 441 U.S. at 390 n. 9, 99 S.Ct. at 1767 n. 9 (the Court gave plenary consideration to an issue presented and summarily dismissed only three years before and reversed itself).

This review of the *Hicks* rule provides some guidance in determining the precedential weight we should give to the summary dismissal of *Queensgate*. To the extent that the same constitutional issues are presented in this case as were presented in *Queensgate*, that decision is binding, though the reasoning of the Ohio Supreme Court may not be. In his concurring opinion in *Mandel*, Mr. Justice Brennan suggested that in determining the reach of a summary dismissal as precedent, a court must: "(a) examine the jurisdictional statement in the earlier case

to be certain that the constitutional questions presented were the same and, if they were, (b) determine that the judgment in fact rests upon decision of those questions and not even arguably upon some alternative nonconstitutional ground." *Mandel, supra* 432 U.S. at 180, 97 S.Ct. at 2242 (Brennan, J., concurring). These guidelines have been used by other courts. *See Socialist Workers Party v. March Fong Eu*, 591 F.2d 1252, 1257-58 (9th Cir.), *cert. denied*, 441 U.S. 946, 99 S.Ct. 2167, 60 L.Ed.2d 1049 (1979); *Lecates v. Justice of the Peace Court No. 4*, 637 F.2d 898, 904-05 (3d Cir. 1980). We consider them to be appropriate here.

III.

The jurisdictional statement in *Queensgate* presented the following question to the Supreme Court:

> Whether Regulation 4301:1-1-44 of the Ohio Liquor Control Commission, which prohibits a duly licensed retail liquor permit holder from advertising the retail price of alcoholic beverages in any medium visible from outside the permit premises, violates the First and Fourteenth Amendments of the Constitution of the United States by suppressing the public dissemination of truthful information about a lawful activity.

Jurisdictional Statement at I, *Queensgate*, —— U.S. ——, 103 S.Ct. 31, 74 L.Ed.2d 45. In support of the proposition that the question was a substantial one, the appellant in *Queensgate* argued that the advertising in question was protected commercial speech, that the Twenty-First Amendment did not allow a state to infringe on protected commercial speech, and that the regulation in question was an unconstitutional infringement on its First Amendment rights when analyzed under the four-part *Central Hudson* test.

In the instant case, the issue is substantially similar. In essence, that issue is: is Oklahoma's advertising pro-

hibition an unconstitutional infringement on protected commercial speech? Implicit in that issue, as we believe was implicit in *Queensgate*, is the issue of whether the Twenty-first Amendment in some way enhances a state's authority to regulate commercial speech concerning alcoholic beverages. To be sure, there are factual distinctions between *Queensgate* and the instant case: the regulated parties here are television stations, not liquor permit holders; the laws here prohibit the rebroadcasting of all advertising of alcoholic beverages, except for beer advertising, while the regulation in *Queensgate* prevented only off-premises price advertising; and other minor distinctions. The crucial similarity between the cases, however, is this: in both cases, the state, acting under its powers granted by the Twenty-first Amendment, has chosen to prohibit some, but not all, forms of liquor advertising with the goal of decreasing the consumption and abuse of alcoholic beverages. We are confident that the constitutional question presented in *Queensgate* and in the present appeals is substantially the same.

The second inquiry is whether there are any nonconstitutional grounds upon which the Supreme Court may have decided *Queensgate*. As noted above, the appellant's jurisdictional statement in *Queensgate*, while minimizing the effect of the Twenty-first Amendment, clearly concentrated on the argument that the regulation there violated its First Amendment rights to commercial speech. In its motion to dismiss for want of a substantial federal question, the Ohio Liquor Control Commission relied solely on the argument that the state was free to regulate liquor advertising as part of its broad Twenty-first Amendment power to regulate liquor and minimize its evils. In our view, *Queensgate* manifestly presented an issue concerning the tension between the First and Twenty-first Amendments. The Supreme Court arguably may have decided the case on nonconstitutional grounds; if so, however, we cannot discern them. It is our view

that the Supreme Court decided Ohio's regulation was not an unconstitutional infringement on the appellant's First Amendment rights. The *Queensgate* dismissal is binding on this court.

IV.

Still, the Supreme Court has warned against courts being so preoccupied with a summary dismissal that they fail "to undertake an independent examination of the merits." *Mandel, supra* 432 U.S. at 177, 97 S.Ct. at 2241. In light of that warning, and because the laws here in question are indeed broader than the regulation in *Queensgate*, we will follow the approach taken by the court in *Plante v. Gonzalez*, 575 F.2d 1119 (5th Cir. 1978), *cert. denied*, 439 U.S. 1129, 99 S.Ct. 1047, 59 L.Ed.2d 90 (1979); *i.e.*, *Queensgate* will "caution us" against finding Oklahoma's laws to be unconstitutional, but we must still examine the merits of these appeals. *Id.* at 1125-26. In understanding this examination, we are mindful that *Queensgate* "broke no new ground", and that we cannot reach an opposite conclusion "on the precise issues presented and necessarily decided by" *Queensgate*. *Mandel, supra* 432 U.S. at 176, 97 S.Ct. at 2241.

The crucial question in this case, as it was under our interpretation of *Queensgate*, is whether Oklahoma's prohibition against advertising of alcoholic beverages, as applied to the Appellees, violates their First Amendment rights, as guaranteed by the Fourteenth Amendment. The resolution of this issue involves an examination of the relative interests at stake; that is, we must balance the right of Telecasters and the cable operators to engage in commercial speech against the right of Oklahoma, through its general police powers as enhanced by the Twenty-first Amendment, to regulate commercial speech relating to alcoholic beverages.

The relevant section of the Twenty-first Amendment states: "The transportation or importation into any State Territory, or possession of the United States for delivery

or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. Const., amend. XXI, § 2. While the states have broad authority to regulate alcoholic beverages under their traditional police powers standing alone, *Wisconsin v. Constantineau*, 400 U.S. 433, 436, 91 S.Ct. 507, 509, 27 L.Ed.2d 515 (1971), "the broad sweep of the Twenty-first Amendment has been recognized as conferring something more than the normal state authority over public health, welfare, and morals." *California v. LaRue*, 409 U.S. 109, 114, 93 S.Ct. 390, 395, 34 L.Ed.2d 342 (1972). Thus, under the Twenty-first Amendment, the states have the power to prohibit totally the sale of liquor within their boundaries, *New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 715, 101 S.Ct. 2599, 2600, 69 L.Ed.2d 357 (1981) (per curiam); *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138, 60 S.Ct. 163, 167, 84 L.Ed. 128 (1939), and the concomitant power to regulate the times, places, and circumstances under which liquor may be sold. *Bellanca, supra*, 452 U.S. at 715, 101 S.Ct. at 2600. Moreover, within the power conferred by the Twenty-first Amendment, a "State may protect her people against evil incident to intoxicants . . . and may exercise large discretion as to means employed." *Ziffrin, supra* 308 U.S. at 138-39, 60 S.Ct. at 167.

On two separate grounds, therefore, we hold that Oklahoma's alcoholic beverage advertising prohibitions are an exercise of authority within that granted by the Twenty-first Amendment. First, the purpose of the advertising here unquestionably is to encourage sales of alcoholic beverages. As such, the advertising could be considered an incident of the sale of liquor which the state may regulate as it regulates sales themselves: "[t]he prohibition against certain forms of advertising is really a prohibition against soliciting of business." *Premier-Pabst Sales Co. v. State Board of Equalization*, 13 F.Supp. 90, 96 (S.D.Cal.1935). Alternatively, the laws are justified as one of the means, selected by an exercise of its broad

discretion, by which Oklahoma has chosen to achieve the proper goal of protecting its people against the harms incident to the use of alcoholic beverages. *Ziffrin, supra* 308 U.S. at 138-39, 60 S.Ct. at 167. The latter justification was the one the State of Ohio presented to the Supreme Court in *Queensgate*. Under either analysis, Oklahoma's liquor advertising laws are within its powers under the Twenty-first Amendment. Accordingly, they are entitled to the " 'added presumption in favor of the validity of the state regulation' conferred by the Twenty-first Amendment." *Bellanca, supra* 452 U.S. at 718, 101 S.Ct. at 2601 (*quoting California v. LaRue, supra* 409 U.S. at 118, 93 S.Ct. at 397).

V.

The determination that Oklahoma's laws are within its authority under the Twenty-first Amendment, however, does not end our inquiry. The Twenty-first Amendment did not grant to the states the authority to abrogate individual rights guaranteed by the Fourteenth Amendment. *Craig v. Boren*, 429 U.S. 190, 206-09, 97 S.Ct. 451, 461-63, 50 L.Ed.2d 397 (1976); *Wisconsin v. Constantineau, supra* 400 U.S. at 436, 91 S.Ct. at 509 (1971). A state's power under the Twenty-first Amendment must be considered in the light of the other provisions of the Constitution "in the context of the issues and interests at stake in any concrete case." *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332, 84 S.Ct. 1293, 1298, 12 L.Ed.2d 350 (1964).

In this case, then, we must consider the Twenty-first Amendment in the light of the First Amendment. There is no serious dispute that the advertising here in question is commercial speech, entitled to some degree of protection under the First and Fourteenth Amendments.[7]

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[7] Crisp belatedly argues that the advertisements here are "inherently misleading" and therefore properly prohibited. *See In re*

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976); *Bates v. State Bar*, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977); *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 97 S.Ct. 1614, 52 L.Ed.2d 155 (1977). In interpreting the scope of protection afforded by the First Amendment, however, there is a "common-sense and legal distinction between speech proposing a commercial transaction and other varieties of speech. . . ." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 506, 101 S.Ct. 2882, 2891, 69 L.Ed.2d 800 (1981) (plurality opinion). Rather than dilute the First Amendment, the Supreme Court has "afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression." *Ohralik v. Ohio State Bar Association*, 436 U.S. 477, 456, 98 S.Ct. 1912, 1918, 56 L.Ed.2d 444 (1978).

Our duty here is to determine whether Oklahoma's laws are a permissible regulation of the Appellee's attenuated First Amendment rights. In doing so, we must bear in mind that the Supreme Court allowed substantially similar regulations, despite similar challenges, in *Queensgate*. Nevertheless, in view of the holding in *Craig*

R.M.J., 455 U.S. 191, 202, 102 S.Ct. 929, 937, 71 L.Ed.2d 64; *Friedman v. Rogers*, 440 U.S. 1, 15-16, 99 S.Ct. 887, 897, 59 L.Ed.2d 100 (1979); *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 462, 98 S.Ct. 1912, 1921, 56 L.Ed.2d 444 (1978). Irrespective of whether that argument is properly before us, it is clear that Oklahoma's laws are not aimed at preventing deceptive or misleading advertising. Indeed, if they were, they would be in danger of being struck down as being more extensive than reasonably necessary. *See, e.g., In re R.M.J., supra* 455 U.S. at 207, 102 S.Ct. at 940. The purpose of Oklahoma's laws is to prevent the excessive consumption of alcohol. For purposes of determining the constitutionality of the laws in that context, we are willing to accept the trial court's finding that the advertising is truthful.

v. Boren, *supra* 429 U.S. at 209, 97 S.Ct. at 463, that the Twenty-first Amendment does not alter the standards otherwise applicable in equal protection cases, we will apply the analysis for determining the validity of regulation of commercial speech articulated by the Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 100 S.Ct 2343, 65 L.Ed.2d 341 (1980).

In *Central Hudson*, the Court reiterated that commercial speech is accorded lesser protection under the Constitution than other forms of constitutionally protected expression. *Central Hudson*, *supra* at 563, 100 S.Ct. at 2350 (*citing Ohralik*, *supra* 436 U.S. at 457, 98 S.Ct. at 1919). According to the Court, the "protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation." *Central Hudson*, *supra* 447 U.S. at 563, 100 S.Ct. at 2350. In order to balance those two competing interests, the Court proposed the following four-part analysis:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than necessary to serve that interest.

Central Hudson, *supra* at 566, 100 S.Ct. at 2351.

The threshold presented by the first two steps is easily crossed. In all relevant respects, the commercial speech here in question concerns lawful activity. The sale and consumption of alcoholic beverages, though heavily regu-

lated, is lawful within the State of Oklahoma.[8] Nor, despite Crisp's allegations, are the advertisements inherently misleading.[9] The commercial speech here is protected speech under the First Amendment. *See Virginia Board of Pharmacy, supra.*

The asserted governmental interest of Oklahoma in prohibiting the advertising of alcoholic beverages is to reduce the sale and consumption of liquor, and thereby reduce the problems associated with alcohol abuse. There can be no question that this asserted interest is substantial. Under its general police power, Oklahoma has a legitimate and substantial interest in the health and welfare of its citizens, the safety of its highways, the stability of its families, and the productivity of its work force, all of which are significantly and adversely affected by the abuse of alcohol. Added to this already substantial interest is the power of Oklahoma under the Twenty-

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[8] Crisp argues that some of the advertising displays conduct which would be unlawful in Oklahoma. First, we do not consider it significant that a nationally broadcast advertisement may show conduct, such as drinking wine in public, which is unlawful in Oklahoma. The purpose of the advertisement is to sell wine, which may be done lawfully in Oklahoma, not to encourage public drinking in violation of the laws of Oklahoma. Secondly, if Oklahoma's true purpose were to prevent only such advertising, the laws again are far more extensive than necessary.

[9] *See* footnote 7, *supra*. Indeed, the qualities that Crisp alleges make these wine commercials "inherently misleading"—the commercials tend to project an image of wine drinkers as successful, fun-loving people, without warning of the dangers of alcohol—are present in the advertising of almost any product from automobiles to snack foods. The Supreme Court's concern with "inherently misleading" advertising is directed towards advertising methods which tend to encourage fraud, overreaching, or confusion, such as some forms of lawyer solicitation. *See Ohralik, supra* 436 U.S. at 462, 98 S.Ct. at 1921. As to advertising in general, the Supreme Court has rejected a paternalistic approach in favor of assuming "that people will perceive their own best interests . . ." if the channels of communication are left open. *Virginia State Board of Pharmacy, supra* 425 U.S. at 770, 96 S.Ct. at 1829.

first Amendment to regulate the sale, and the incidents thereof, of alcoholic beverages, and to protect its citizens from the evils incident to alcohol. *See Ziffrin, supra* 308 U.S. at 138-39, 60 S.Ct. at 167. The asserted state interest, therefore, is exceptionally strong.

We must determine whether Oklahoma's laws directly advance its asserted governmental interest. The trial court found that the laws are at best an indirect means of advancing Oklahoma's interest. In particular, the court noted that other means, such as early and continuing education about the dangers of alcohol abuse, were available. In our view, the trial court misconceived the purpose of this inquiry. *Central Hudson* does not require that we determine whether Oklahoma has chosen the best means to advance its interest; rather the inquiry is whether the means chosen by the legislature, however objectionable any court may find them, directly advance the asserted state interest.

In undertaking this inquiry, we note the approach taken by the plurality in *Metromedia* in applying the third part of the *Central Hudson* test: "We likewise hesitate to disagree with the accumulated, common-sense judgments of local lawmakers and of the many reviewing courts that billboards are real and substantial hazards to traffic safety. There is nothing here to suggest that these judgments are unreasonable." *Metromedia, supra* 453 U.S. at 509, 101 S.Ct. at 2893 (footnote omitted). In that case, the appellants argued that there was nothing in the record to show any connection between billboards, which San Diego had essentially prohibited, and traffic safety, one of the asserted governmental interests. The California Supreme Court had held, nevertheless, that as a matter of law the ordinance eliminating billboards was reasonably related to traffic safety. *Id.* at 508, 101 S.Ct. at 2893. The plurality agreed with that holding. *Id.* at 509, 101 S.Ct. at 2893.

In this appeal, the Appellees similarly argue, and the trial court agreed, that the record does not demonstrate that Oklahoma's laws have any direct effect on the consumption of alcohol. In light of the plurality's language in *Metromedia*, however, and particularly in light of the additional deference owed to the legislature as a result of the Twenty-first Amendment, *Bellanca*,[10] *supra*, we hold, as a matter of law, that prohibitions against the advertising of alcoholic beverages are reasonably related to reducing the sale and consumption of those beverages and their attendant problems. The entire economy of the industries that bring these challenges is based on the belief that advertising increases sales. We therefore do not believe that it is constitutionally unreasonable for the State of Oklahoma to believe that advertising will not only increase sales of particular brands of alcoholic beverages but also of alcoholic beverages generally. The choice of the Oklahoma legislature, and its people with respect to the constitutional provision, is not unreasonable, and does directly advance Oklahoma's interest in reducing the sale, consumption, and abuse of alcoholic beverages.

The final inquiry under the *Central Hudson* test is whether Oklahoma's laws are more extensive than is necessary to serve its interest. The trial court con-

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[10] The regulations in question in *Bellanca* prevented nude dancing in establishments which sold liquor for on-premises consumption. Despite the fact that the regulation played a different role in New York's alcoholic beverage regulatory scheme than the laws here, we find the following language instructive:

> Whatever artistic or communicative value may attach to topless dancing is overcome by the State's exercise of its broad powers arising under the Twenty-first Amendment. Although some may quarrel with the wisdom of such legislation and may consider topless dancing a harmless diversion, the Twenty-first Amendment makes that a policy judgment for the state legislature, not the courts.

Bellanca, supra 452 U.S. at 718, 101 S.Ct. at 2601.

cluded, and Appellees urge, that since with respect to Telecasters and the cable operators all rebroadcasting of alcoholic beverage advertising was prohibited, the laws were more extensive than necessary.

Again, the plurality opinion in *Metromedia* is instructive. In that case, San Diego's ordinance banned virtually all billboards, allowing only on-site advertising and other limited exceptions. According to the stipulated facts in the case, the result of the ordinance was to eliminate completely the outdoor advertising business in San Diego. *Metromedia, supra* 453 U.S. at 497, 101 S.Ct. at 2887. Nevertheless, noting in particular that on-site advertising and some other signs were specifically exempted from the ordinance, the plurality held that the ordinance was no broader than necessary. *Id.* at 508, 101 S.Ct. at 2893.

We recognize, of course, that the plurality eventually did strike down the ordinance in *Metromedia*. It did so, however, only on the grounds that the ordinance violated the First Amendment protections for political and other noncommercial speech. *Metromedia, supra* at 513-17, 101 S.Ct. at 2895-97. The plurality's analysis clearly distinguished between commercial and non-commercial speech. With respect to the commercial speech aspect of the case, the plurality applied the *Central Hudson* test and found that the ordinance was constitutional. *Metromedia, supra* at 507-09, 512, 101 S.Ct. at 2891-93, 2895.

It is our view, therefore, that Oklahoma's laws also pass the fourth and final test under *Central Hudson*. Even though Appellees are completely prohibited from rebroadcasting alcoholic beverage advertising, they are free to carry other forms of advertising. We recognize that the cable operators especially are placed in a difficult position; however, nothing in the First Amendment prohibits this result. *See Metromedia, supra*. On-premises advertising is allowed, the rebroadcast of beer advertising is not prohibited, and alcoholic beverage advertising

in out-of-state printed publications distributed in Oklahoma is allowed. Although Appellees bear a disproportionate burden of the regulation, Oklahoma has not eliminated the dissemination of information concerning alcoholic beverages. With particular emphasis on the power of Oklahoma under the Twenty-first Amendment, we hold that the advertising prohibitions here are no more extensive than is necessary to serve Oklahoma's asserted interest. Article XXVII, § 5, of the Oklahoma Constitution, and Section 516 of title 37 of the Oklahoma Statutes, are valid restrictions on commercial speech and do not violate the Appellees' First Amendment rights.

We again emphasize that the *Central Hudson* test is essentially a balancing test. When the Twenty-first Amendment is considered in addition to Oklahoma's substantial interest under its police power, the balance shifts in the state's favor, permiting regulation of commercial speech that might not otherwise be permissible. We believe that the Supreme Court's summary dismissal in *Queensgate* mandates this result. We order that the permanent injunctions be dissolved and we reverse the district court's summary declaratory judgments.

McKAY, Circuit Judge, concurring:

While I fully concur in the court's opinion, I add this concurring statement to bring out an additional serious consequence of the alternative result. The section under attack in these cases was enacted by a vote of the people at large in a single referendum petition that included not only the regulatory scheme but the surrender by repeal of the Prohibition Ordinance, *see* Okla. Const., art. XXVII, §§ 1-11 (1981) (each section composed part of State Question No. 386, Referendum Petition No. 121 which was adopted at election held April 7, 1959), which had stood since statehood as the fundamental law of Oklahoma separately voted on by the people at large. The regulatory package was clearly the quid pro quo for the sur-

rendered after decades of dispute of this long held public standard. I have serious doubt that federal courts are at liberty glibly to sever and strike down one section of such an integrated state decision with its long and turbulent history, *see Spokane Arcades, Inc. v. Brockett*, 631 F.2d 135 (9th Cir. 1980), *aff'd*, 454 U.S. 1022, 102 S.Ct. 557, 70 L.Ed.2d 468 (1981), *reh'g denied*, 454 U.S. 1165, 102 S.Ct. 1040, 71 L.Ed.2d 322 (1982), without striking down the whole and restoring the status quo ante whether any of the parties would desire such a result.

APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Before Honorable James E. Barrett, Honorable Monroe G. McKay, and Honorable James K. Logan, Circuit Judges

No. 82-1061

CABLECOM-GENERAL, INC., COX CABLE OF OKLAHOMA CITY, INC., MULTIMEDIA CABLEVISION, INC., SAMMONS COMMUNICATION, INC.,

Plaintiffs-Appellees,

vs.

RICHARD A. CRISP, Director,
Alcohol Beverage Control Board,
Defendant-Appellant,

SANE, INC., OKLAHOMA PRESS ASSOCIATION, OUTDOOR ADVERTISING ASSOCIATION OF OKLAHOMA, STATE OF MISSISSIPPI,

Amici Curiae.

This matter comes on for consideration of appellees' petition for rehearing filed in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS
Clerk

Date of Entry: March 21, 1983

APPENDIX C

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Before Honorable James E. Barrett, Honorable Monroe G. McKay, and Honorable James K. Logan, Circuit Judges

No. 82-1061

CABLECOM-GENERAL, INC., COX CABLE OF OKLAHOMA CITY, INC., MULTIMEDIA CABLEVISION, INC., SAMMONS COMMUNICATION, INC.,

Plaintiffs-Appellees,

vs.

RICHARD A. CRISP, Director,
Alcohol Beverage Control Board,
Defendant-Appellant,

SANE, INC., OKLAHOMA PRESS ASSOCIATION, OUTDOOR ADVERTISING ASSOCIATION OF OKLAHOMA, STATE OF MISSISSIPPI,

Amici Curiae.

This matter comes on for consideration of appellees' motion for stay of mandate in the captioned cause pending application to the Supreme Court for certiorari.

Upon consideration whereof, it is ordered that the mandate is stayed until May 4, 1983, pending certiorari and that if, on or before that date, there is filed with the Clerk of the Court of Appeals a notice from the Clerk of the Supreme Court of the United States that appellees have timely filed a petition for writ of certiorari in the Supreme Court, the stay shall continue until final disposition by the Supreme Court.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS
Clerk

Date of Entry: April 4, 1983

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-81-290-W

CABLECOM-GENERAL, INC.; COX CABLE OF OKLAHOMA CITY, INC.; MULTIMEDIA CABLEVISION, INC.; AND SAMMONS COMMUNICATIONS, INC.,
Plaintiffs

v.

RICHARD A. CRISP, DIRECTOR,
ALCOHOLIC BEVERAGE CONTROL BOARD,
Defendant.

PRELIMINARY INJUNCTION

This cause came on for hearing on March 6, 1981 on plaintiffs' Motion for Preliminary Injunction. All parties appeared by counsel. The Court, having heard the testimony of the witnesses and argument of counsel, finds as follows:

1. This action is brought against the defendant in his official capacity as the Director of the Alcoholic Beverage Control Board of the State of Oklahoma. Defendant's official duties include investigation of potential violations of Alcoholic Beverage Laws and aiding prosecution of violations. 37 O.S. § 509. Oklahoma's Alcoholic Beverage Laws include a prohibition against advertising alcoholic beverages.

2. Plaintiffs are operators of various cable television systems throughout the State of Oklahoma. As part of their programming, they relay to subscribers the signals of out of state television stations, which signals include commercials advertising alcoholic beverages. They seek a declaration that enforcement of Oklahoma laws pro-

hibiting advertisement of alcoholic beverages against them would violate their rights under the United States Constitution and an injunction prohibiting enforcement against them.

3. Defendant has made known his intention to recommend prosecution of plaintiffs if violations of the advertising prohibition are brought to his attention.

4. Plaintiffs' uncontradicted testimony showed that attempting to comply with the advertising prohibition pending final hearing of this action would entail enormous financial burden and would also, in many instances, place them in violation of United States law.

5. In some instances, the signals containing the alcoholic beverage advertisements have been carried by cable systems in the state for over ten years, without previous challenge.

6. Plaintiffs are faced with a genuine threat that the advertising prohibition will be enforced against them, giving this Court jurisdiction to entertain this action.

7. Plaintiffs have demonstrated the probability that they would suffer irreparable injury if defendant is not enjoined from pursuing enforcement pending final hearing of this action.

8. Plaintiffs have demonstrated a sufficient probability of success to justify preliminary relief preserving the status quo, particularly in light of the absence of any showing of injury to defendant from the granting of such relief.

IT IS THEREFORE ORDERED, that defendant, in his official capacity, his agents, employees, attorneys, and all persons in active concert or participation with him are hereby enjoined pending determination of this action from attempting to enforce or assisting or recommending any attempted enforcement of Oklahoma law

prohibiting advertisement of alcoholic beverages against these plaintiffs.

LEE R. WEST
United States District Judge

Date of Entry: March 19, 1981

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

CIV-81-290-W

CABLE-COM GENERAL, INC.; COX CABLE OF OKLAHOMA CITY, INC.; MULTIMEDIA CABLEVISION, INC.; SAMMONS COMMUNICATION, INC.,

Plaintiffs,

vs.

RICHARD A. CRISP, Director, Alcoholic Beverage Control Board,

Defendant.

DECLARATORY JUDGMENT

Pursuant to 28 U.S.C. § 2201, and in accordance with the Memorandum Opinion entered herein this 18th day of December, 1981,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that enforcement of Article 27, § 5, of the Oklahoma Constitution or 37 O.S. (1971) § 516 by the defendant, in his official capacity, his agents, employees, attorneys, and all persons in active concert or participation with him, against the plaintiffs is or would be a violation of Plaintiffs' First Amendment rights under the United States Constitution as guaranteed to the states by the Fourteenth Amendment.

IT IS SO ORDERED this 18th day of December, 1981.

/s/ Lee R. West
United States District Judge

Date of Entry: December 18, 1981

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

CIV-81-290-W

CABLE-COM GENERAL, INC.; COX CABLE OF OKLAHOMA CITY, INC.; MULTIMEDIA CABLEVISION, INC.; SAMMONS COMMUNICATION, INC.,

Plaintiffs,

vs.

RICHARD A. CRISP, Director, Alcoholic Beverage Control Board,

Defendant.

PERMANENT INJUNCTION

In accordance with the Memorandum Opinion and Order entered herein this 18th day of December, 1981,

IT IS HEREBY ORDERED that Defendant, in his official capacity, his agents employees, attorneys, and all persons in active concert or participation with him, are permanently enjoined from attempting to enforce or assisting or recommending any attempted enforcement of Article 27, § 5, of the Oklahoma Constitution or 37 O.S. (1971) § 516 against these plaintiffs.

IT IS SO ORDERED this 18th day of December, 1981.

/s/ Lee R. West
United States District Judge

Date of Entry: December 18, 1981

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

CIV-81-290-W

CABLE-COM GENERAL, INC.; COX CABLE OF OKLAHOMA CITY, INC.; MULTIMEDIA CABLEVISION, INC.; SAMMONS COMMUNICATION, INC.,

Plaintiffs,

vs.

RICHARD A. CRISP, Director,
Alcoholic Beverage Control Board,

Defendant.

Richard C. Ford and Clyde A. Muchmore, 1800 Mid-America Tower, Oklahoma City, OK 73102, and Arthur H. Harding, FLEISHMAN AND WALSH, 1725 N Street, N.W., Washington, D.C. 20036 for the plaintiff Cable-Com General, Inc.

Marvin B. York and John W. Maile, BLEVINS & YORK, 1245 S.W. 44th St., Oklahoma City, OK 73109, and David P. Fleming of DOW, LOHNES & ALBERTSON, 1225 Connecticut Ave., Washington, D.C. 20036 for the plaintiff Cox Cable of Oklahoma City, Inc.

Robert Jernigan, 1200 N. Shartel, Oklahoma City, OK 73101, and David P. Fleming of DOW, LOHNES & ALBERTSON, 1225 Connecticut Ave., Washington, D.C. 20036 for the plaintiff Multimedia Cablevision, Inc.

Jap W. Blankenship and Warren F. Bickford of FELLERS, SNIDER, BLANKENSHIP, BAILEY & TIPPENS, 2400 First National Center, Oklahoma City, OK 73102 and David P. Fleming of DOW, LOHNES & ALBERTSON, 1225 Connecticut Ave., Washington, D.C. 20036 for the plaintiff Sammons Communication, Inc.

Jan Eric Cartwright, Attorney General, and Michael C. Conaway, Assistant Attorney General, 112 State Capitol Building, Oklahoma City, OK 73105 for Defendant.

Jerry D. Sokolosky, 514 Park Harvey Center, 200 North Harvey, Oklahoma City, OK 73102 for Amicus Curiae Oklahoma Press Association.

Larry Derryberry of DERRYBERRY, DUNCAN & NANCE, 4420 North Lincoln Boulevard, Oklahoma City, OK 73105 for Amicus Curiae S.A.N.E., Inc.

MEMORANDUM OPINION AND ORDER

Before the Honorable Lee R. West, United States District Judge.

Introduction

Plaintiffs are corporations qualified to do business in Oklahoma and are holders of cable television franchises in the state of Oklahoma. They have franchises throughout the state including operations in Canadian, Ottawa, Oklahoma, Tulsa, Kiowa, Greer, and Noble Counties. Plaintiffs relay to paid subscribers the signals of various television stations, some of which originate outside Oklahoma.

Defendant is the Director and Secretary to the Board of the Alcoholic Beverage Control Board, an agency of the State of Oklahoma charged with primary responsibility for the enforcement of Oklahoma law relating to alcoholic beverages. Director Crisp is sued only in his official capacity.

Some of the programming which Plaintiffs relay to their customers includes advertisements for wine, an alcoholic beverage as defined in Article 27, § 5 of the Oklahoma Constitution, and 37 O.S. § 506 (1971). This advertising is lawful where originated but prohibited in

Oklahoma. Plaintiffs seek a declaratory judgment that, as applied to Plaintiffs, the provisions of Oklahoma's Constitution and laws prohibiting advertisement of alcoholic beverages violate Plaintiffs' constitutional rights. The case was filed on March 3, 1981, and on March 6, 1981, following an evidentiary hearing, the Court preliminarily enjoined Defendant from attempting to enforce the challenged provisions against Plaintiffs during the pendency of this action. That injunction remains in force and Plaintiffs seek to have it made permanent to prohibit Defendant from attempting to enforce or assisting any attempted enforcement as threatened against Plaintiffs.

Plaintiffs have moved for summary judgment pursuant to Rule 56, F.R.Civ.P., on the grounds that the constitutional and statutory ban on advertising violates the plaintiffs' First Amendment right to freedom of speech. Plaintiffs also contend the ban is a violation of Plaintiffs' right to equal protection under the law. The Oklahoma Press Association has filed an amicus curiae brief in support of Plaintiffs' Motion for Summary Judgment.

Defendant has filed a Motion to Dismiss pursuant to Rule 12(b)(6), F.R.Civ.P. Defendant contends that because the Twenty-first Amendment grants a broad sweep of power to Defendant to regulate the liquor industry, the passage of Okla. Const., art. 27, § 5 and the enactment of 37 O.S. § 516 (1971) do not violate the freedom of speech protection of the First Amendment. Defendant further contends that no equal protection violation is manifest in the laws in question because they bear a rational relationship to the legitimate governmental goal of protecting the health, safety, and welfare of the people of Oklahoma. Defendant contends that quasi-judicial and prosecutorial immunity of Richard A. Crisp bars a claim under 42 U.S.C. § 1983. S.A.N.E., Inc., has filed an amicus curiae brief in support of Defendant's Motion to Dismiss.

District Court Jurisdiction

The plaintiffs invoke the jurisdiction of this Court pursuant to 28 U.S.C. §§ 1331, 1343, 2201, and 42 U.S.C. § 1983. Defendant in its answer denies jurisdiction, claiming that the Court should abstain because no federal question is presented and because the Supreme Court of Oklahoma has ruled upon the questions presented here and has declared the constitutional provisions and statute in question to be constitutionally valid.

Defendant does not address these jurisdictional issues in its brief in support of its Motion to Dismiss other than to assert that Defendant is immune from suit pursuant to 42 U.S.C. § 1983 because of the doctrine of quasi-judicial and prosecutorial immunity. Nevertheless, the Court is aware of Defendant's position and authorities from contentions in other briefs and oral arguments presented to the Court. Accordingly, the Court has considered the threshold issue of jurisdiction.

Title 28 U.S.C. § 1343 provides in relevant part:

> The district court shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> * * * *
>
> (3) To redress the deprivation under color of any . . . statute, ordinance . . . of any right, privilege or immunity secured by the Constitution of the United States, ...
>
> (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights . . . .

Title 42 U.S.C. § 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance . . . of any state . . . subjects or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or im-

> munities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The doctrine of quasi-judicial or prosecutorial immunity might be relevant if this were a suit for damages pursuant to 42 U.S.C. § 1983; however, Defendant cites no authority in support of application of the doctrine to a suit such as this one for declaratory or injunctive relief. Neither section 1983 itself nor the Eleventh Amendment presents a bar to a suit for prospective injunctive relief against a state official acting in his official capacity. See, *Acha v. Beame*, 438 F. Supp. 70, 77 (S.D. N.Y. 1977), *aff'd*, 570 F.2d 57 (1978), and cases cited therein.

The federal court has a duty to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims. *Zwickler v. Koota*, 389 U.S. 241 (1967).

The Court is not called upon to give relief that may relate in any way to a pending state criminal proceeding. Accordingly, the type of abstention called for by *Younger v. Harris*, 401 U.S. 37 (1971), would not be appropriate. Neither is the Court dealing with an ambiguous state statute which might require abstention under the Pullman Doctrine. *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941). See generally, Wright, Miller & Cooper, *Federal Practice and Procedure*: Jurisdiction § 4242 at 456.

Furthermore, the issues before this Court have not been decided by the Oklahoma Supreme Court. In *Oklahoma Alcoholic Beverage Control Board v. Heublein Wines International*, 566 P.2d 1158 (Okla. 1977), the Oklahoma Supreme Court held that Oklahoma's prohibition on the advertisement of alcoholic beverages did not violate the Commerce Clause. In *Oklahoma Alcoholic Beverage Control Board v. Burris*, 626 P.2d 1316

(1980), the Oklahoma Supreme Court held that the First Amendment rights of a retail seller of alcoholic beverages were not violated by Oklahoma's laws with respect to liquor advertising. Retail sellers are permitted to place a sign outside their retail outlets and are permitted to advertise in the Yellow Pages of the telephone directory. Those cases are distinguishable from this case where Plaintiffs are prohibited from rebroadcasting alcoholic beverage advertisements which originate outside Oklahoma.

The plaintiffs in this case have demonstrated a genuine threat of enforcement of the constitutionally contested laws and the Court finds that it has jurisdiction of the case pursuant to 42 U.S.C. § 1983, 28 U.S.C. §§ 1331, 1343, and 2201.

Motion for Summary Judgment
Motion to Dismiss

The standard for consideration of cross-motions was recently reiterated in *Harrison Western Corporation v. Gulf Oil Co.*, 662 F.2d 690 (1981) at 691:

> We are fully aware of the fundamental principle that summary judgment is not to be granted unless the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there exists no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Coyce v. Carter Oil Co.*, 618 F.2d 669, 672 (10th Cir. 1980); Rule 56(c), F.R.Civ.P. It is also settled doctrine that the fact that both parties have moved for summary judgment does not permit the entry of a summary judgment if disputes remain as to material facts. *Buell Cabinet Co., Inc. v. Sudduth*, 608 F.2d 431 (10th Cir. 1979); *Securities and Exchange Commission v. American Commodity Exchange, Inc.*, 546 F.2d 1361 (10th Cir. 1976); *Rains v. Cascade*

Industries, Inc., 402 F.2d 241 (3rd Cir. 1968). However, cross motions for summary judgment do authorize the Court to assume that there is no evidence which needs to be considered other than that which has been filed by the parties. *Securities & Exchange Commission v. American Commodity Exchange, Inc., supra; H. B. Zachry Co. v. O'Brien*, 378 F.2d 423 (10th Cir. 1967).

Cross-motions have been filed by the parties. In this case the Court is not only legally authorized to assume that there is no evidence which needs to be considered other than that which has been presented by the parties (*Securities & Exchange Commission v. American Commodity Exchange, Inc., supra*), but the parties have assured the Court both in pretrial conference and in their briefs that irrespective of any factual disputes with respect to other issues in the case, there are no genuine issues of material fact with respect to the issues raised by the motions before the Court. Neither side wishes further evidentiary hearing, and the Court is asked by both parties to decide as a matter of law whether upon the undisputed facts before the Court, Plaintiffs' constitutional rights are violated because they are prohibited by Oklahoma law from relaying broadcasts originating outside Oklahoma which advertise alcoholic beverages.

The Court has given careful consideration to the well reasoned arguments of both parties, to the amicus curiae briefs on behalf of each side to the dispute, and to the legal authorities cited in support of the various contentions. Careful analysis of the pertinent legal authorities demonstrates conclusively that the laws in question, as applied to Plaintiffs, are violative of Plaintiffs' First Amendment rights and that Plaintiffs are entitled to the declaratory and injunctive relief they seek. Because the laws are unconstitutional as applied to Plaintiffs, the Court need not consider whether the laws are un-

constitutional on their face and/or whether they are unconstitutional on equal protection grounds.

The following facts which are material to the issue before the Court are uncontroverted:

1. Plaintiffs are corporations, duly qualified to do business in the state of Oklahoma. Plaintiffs are the holders of cable television franchises in the state of Oklahoma. Plaintiffs have franchises throughout the state including operations in at least the following counties: Canadian, Cleveland, Grady, Logan, Kay, McCurtain, Jackson, Carter, Ottawa, Oklahoma, Tulsa, Kiowa, Greer, and Noble. Many aspects of Plaintiffs' operations are conducted under regulations issued by the Federal Communications Commission under the Federal Communications Act of 1934, 47 U.S.C. §§ 151 et seq.

2. Defendant is the Director and Secretary to the Board of the Alcoholic Beverage Control Board, an agency of the State of Oklahoma charged with primary responsibility for the enforcement of Oklahoma law relating to alcoholic beverages, and is sued here solely in his official capacity.

3. As part of their lawful service to subscribers, Plaintiffs relay to the subscribers the signals of various television stations, some of which originate outside the state of Oklahoma.

4. Plaintiffs have no contractual relationship with the stations whose signals they carry, pay no fee to the stations for said signals, and have no voice in the programming carried by such stations.

5. Plaintiffs are prohibited by FCC regulations having the force of law and by the Copyright Act, 17 U.S.C. § 111(c)(3), from altering or modifying the signals of the stations they carry, except as expressly permitted by such regulations. 47 C.F.R. § 76.55(b).

6. For many years and continuing to the present, some of the programming relayed to Plaintiffs' customers has included advertisements for wine, an alcoholic beverage as defined in Article 27, § 5 of the Oklahoma Constitution, and 37 O.S. § 506.

7. Said advertising is lawful where originated, and no provision of federal regulations authorizes Plaintiffs to delete it from the signals relayed to Plaintiffs' customers.

8. Advertisement of alcoholic beverages within the state of Oklahoma is prohibited by Art. 27, § 5 of the Oklahoma Constitution and 37 O.S. § 516.

9. In *Oklahoma Alcoholic Beverage Control Board v. Heublein Wines International, supra*, the Oklahoma Supreme Court held the Commerce Clause did not prohibit the ban and that the constitutional and statutory advertising prohibitions required broadcast television stations to block out wine advertising in programming delivered to them by the networks. The ban was not challenged on First Amendment grounds.

10. On May 19, 1980, the Attorney General of the State of Oklahoma issued an Opinion declaring that the prohibitions on alcoholic beverage advertising applicable to broadcast television apply similarly to cable television.

11. Defendant has threatened cable television operators in the state of Oklahoma, including Plaintiffs, with criminal prosecution if they continue to carry programming containing alcoholic beverage advertising. Defendant's actions have included letters to all cable operators notifying them of the alleged illegality of the wine commercials as well as express oral and written threats of imminent prosecution.

12. There exists no feasible way for Plaintiffs to block out the advertisements.

13. Failure to carry the out-of-state stations containing wine commercials would place Plaintiffs in violation of their franchises and would probably cause a large but inherently immeasurable reduction in Plaintiffs' subscriber revenue.

14. The stated purpose of the advertising ban is to reduce consumption of alcoholic beverages.

15. Consumption of alcoholic beverages in Oklahoma has increased substantially in the last 20 years despite the ban on advertising of such beverages.

16. The sale, purchase, and consumption of alcoholic beverages is, subject to certain limitations not material to this action, lawful in Oklahoma.

The State of Oklahoma can, under the Twenty-first Amendment, totally prohibit the sale of alcoholic beverages within the state of Oklahoma. The question before the Court is whether having legalized the sale of alcoholic beverages, the State can totally prohibit advertising of alcoholic beverages except for one sign at the retail outlet and a listing of wholesalers and retailers of alcoholic beverages in the Yellow Pages of the telephone directory.

There is no question that Plaintiffs have a speech interest protected by the First Amendment to the United States Constitution. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 773 (1976); *Bigelow v. Virginia*, 421 U.S. 809 (1975); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978).

The Supreme Court traced the recent development in the protection of commercial speech in *Metromedia, Inc. v. City of San Diego*, 49 U.S.L.W. 4925 (1980), as follows:

> The extension of First Amendment protection to purely commercial speech is a relatively recent development in First Amendment jurisprudence. Prior to 1975, purely commercial advertisements and services or goods for sale were considered to be outside the protection of the First Amendment. *Valentine v. Chrestensen*, 316 U.S. 52 (1942). That construction of the First Amendment was severely cut back in *Bigelow v. Virginia*, 421 U.S. 809 (1975). In *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748 (1976), we plainly held that speech proposing no more than a commercial transaction enjoys a substantial degree of First Amendment protection: A state may not completely suppress the dissemination of truthful information about an entirely lawful activity merely because it is fearful of that information's effect upon its disseminators and its recipients.

49 U.S.L.W. at 4929.

In applying the First Amendment to commercial speech, the Supreme Court rejected the "highly paternalistic" approach that the State's protectiveness of its citizens rests in large measure on the advantages of their being kept in ignorance. Instead, it noted the presence of a potent alternative—"that alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them." *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., supra*, at 770.

Such commercial expression not only serves the economic interest of the speaker but also assists the consumers and furthers the societal interest in the fullest possible dissemination of information. *Virginia Board of Pharmacy v. Virginia Consumer Council, Inc., supra; Bates v. State Bar of Arizona*, 433 U.S. 350, 365 (1977).

See also, *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 92 (1977).

Recently, the Supreme Court has found unconstitutional a blanket prohibition of price advertising by pharmacists, a blanket suppression of advertising by attorneys, and a blanket prohibition of advertising carrying information about the availability and price of contraceptives. *Virginia Board of Pharmacy v. Virginia Consumer Council, supra; Bates v. State Bar of Arizona*, 433 U.S. 350, 383 (1977); *Carey v. Population Services International*, 431 U.S. 678 (1977).

Of course misleading advertising may be prohibited entirely. *Ohralic v. Ohio State Bar Association, supra, Friedman v. Rogers*, 440 U.S. 1 (1979). And even when advertising is not misleading, the State retains some authority to regulate if the restriction is narrowly drawn and the regulation furthers the State's substantial interest. *Central Hudson Gas Co. v. Public Service Commission*, 447 U.S. 557 (1980).

Article 27, § 5 of the Constitution of Oklahoma makes it "unlawful for any person, firm or corporation to advertise the sale of alcoholic beverage within the State of Oklahoma, except one sign at the retail outlet bearing the words 'Retail Alcoholic Liquor Store.'" The Oklahoma Statutes provide:

> It shall be unlawful for any person, firm or corporation to advertise any alcoholic beverages or the sale of same within the State of Oklahoma, except one sign at the retail outlet bearing the words 'Retail Alcoholic Liquor Store,' or any combination of such words, or any of them, and no letter in any such sign shall be more than four (4) inches in height, or more than three (3) inches in width, and if more than one line is used, the lines shall not be more than one (1) inch apart.

37 O.S. (1971) § 516.

The defendant claims that the Twenty-first Amendment overrides any First and Fourteenth Amendment rights of the plaintiffs.

The Twenty-first Amendment, § 2, provides:

> The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof is hereby prohibited. U.S. Const. amend. XXI, § 2.

Defendant relies upon *California v. LaRue*, 409 U.S. 109 (1972), in urging the proposition that any speech which is used in connection with the sale of alcoholic beverages may be proscribed by a state under the broad grant of power to the states by the Twenty-first Amendment.

The circumstances of the present case are distinguishable from *California v. LaRue, supra.* In that case the California Department of Alcoholic Beverage Control regulations prohibited certain sexually explicit live entertainment or films in establishments licensed to sell liquor by the drink. The regulations prohibited the performance of specific acts including sexual intercourse, masturbation, sexual acts prohibited by law, touching or fondling of breasts or genitals, displaying of genitals, or films depicting such prohibited acts. The Supreme Court found that the State's interest outweighed the challenger's First Amendment rights and that the State had chosen a reasonable means to attain its interests since it had not totally prohibited the performances in question but had merely proscribed such performances in establishments licensed to sell liquor by the drink.

In this case, the plaintiffs are prohibited from disseminating advertisements of something the public already knows from experience and from reading newspaper and magazine advertising—that alcoholic beverages exist and are for sale at certain prices.

A careful reading of *California v. LaRue, supra*, reveals that the decision "did not go so far as to hold or say that the Twenty-first Amendment supersedes all other provisions of the United States Constitution in the area of liquor regulations." *Id.* at 115.

The Supreme Court recently addressed the power of the states under the Twenty-first Amendment in deciding that a California state plan for wine pricing was subject to the federal antitrust laws despite the state's power to regulate importation and transportation of liquor under the Twenty-first Amendment. *California Liquor Dealers v. Midcal Aluminum*, 445 U.S. 97 (1980). The Supreme Court points out that in determining state powers under the Twenty-first Amendment, the focus has been largely on the language of the provision rather than the history behind it. ". . . Even when the states had acted under the explicit terms of the Amendment the Court resisted the contention that § 2 'freed the states from all restrictions upon the police power to be found in other provisions of the Constitution . . . .'" *Id.* at 108. The Supreme Court states that important federal interests in liquor matters survived the ratification of the Twenty-first Amendment including the equal protection requirements of the Fourteenth Amendment (citing to *Craig v. Boren*, 429 U.S. 190, 204-209 (1976)) and due process requirements (citing to *Wisconsin v. Constantineau*, 400 U.S. 433, 436 (1971)).

The Supreme Court has decided that fundamental constitutional rights such as due process, equal protection, and freedom of speech are not swallowed up by the Twenty-first Amendment. Accordingly, we are required to consider each part of the constitution in light of the other and in the context of the issues and interests at stake in the case before us.

Applying the legal propositions that the State cannot totally prohibit the dissemination of truthful information about a lawful activity; that the State has broad

power under the Twenty-first Amendment to regulate the sale of alcoholic beverages; and that the State retains the authority to regulate advertising if the interference is in proportion to the interests served to the undisputed facts before us, is it constitutional for the State of Oklahoma to totally prohibit the advertising of alcoholic beverages except for one sign at the retail outlet and a listing of outlets in the Yellow Pages of the telephone directory?

The four-part inquiry in *Central Hudson Gas and Electric Corp. v. Public Service Commission, supra,* provides a means of balancing the constitutional rights of the parties. The analysis turns on the nature of the expression sought to be suppressed and the government interests served by the regulation in question.

The test is as follows: First, the expression must be protected by the First Amendment; that is, it must concern lawful activity and not be misleading. Second, the asserted government interest must be substantial. Third, the regulation in question must directly advance the governmental interest asserted; and fourth, the regulation must not be more extensive than is necessary to serve that interest.

In applying the test to this case, first, we are dealing with protected speech because there is no claim that the communications suppressed are either misleading or related to unlawful activity.

Second, the asserted government interest is substantial. Promotion of temperance is the State interest cited in the Opinion of the Attorney General as justification for the ban. Atty.Gen.Op.No. 77-244 (September 19, 1977). Another stated goal of the Oklahoma Alcoholic Beverage Control Act as stated in the briefs is "an exercise of the police power of the State of Oklahoma for the protection of the welfare, health, peace, temperance, and safety of the people of the State . . . ."

The State of Oklahoma has a substantial interest in the health and welfare of its people. The Twenty-first Amendment gives it a substantial amount of control over the sale of alcoholic beverages. The Court recognizes the legitimacy and importance of the State's goals of protecting its citizens. The disease of alcoholism and the deaths and injuries caused by the abuse of alcohol are very real concerns to the people and the government of this state.

Third, the Court finds that under the undisputed facts, the ban on advertising is at best an indirect means of advancing the State's interest in temperance for the following reasons. There is no evidence before the Courts that Oklahoma's ban on advertising is a direct means of preventing alcohol abuse or protecting the health, safety, or welfare of Oklahomans. It is uncontroverted that consumption of alcoholic beverages in Oklahoma has increased substantially in the last twenty years despite the ban on advertising of such beverages. Of course, the argument can be made that an even greater increase would have occurred but for the ban. The realities of the situation are that beer commercials have been permitted despite the ban; wine commercials are heard in Oklahoma on radio broadcasts which originate outside the state; beer, wine, and distilled spirits advertisements in magazines originating outside Oklahoma are permitted. The Court finds it hard to believe that the prohibition of advertising by Oklahoma media is a direct means of achieving temperance.

There are other means available to the State which are more direct means of combating Oklahoma's alcohol abuse problems. Some of these were recommended by the Task Force on Alcohol Abuse after several months of study and interchange on the issue. The highest priority was given to early and continuing education about the biological and psychological effects of alcohol and its potential for personal and social harm. See,

"Alcohol Abuse in Oklahoma," Report and Recommendation of the Task Force on Alcohol Abuse. Such an approach would be in keeping with the Supreme Court's view that the best means to help people to perceive their best interests is to open the channels of communication rather than to close them.

Fourth, the State's attempted regulation is more extensive than necessary to serve the State's interest.

Defendant contends that it is important for the Court to note that Oklahoma has not denied the liquor industry all means of advertising its product, noting that retail liquor establishments are permitted one sign and a listing in the Yellow Pages of the telephone directory.

The plaintiffs in this case, however, are holders of cable television franchises and are totally prohibited from rebroadcasting advertisements for alcoholic beverages which originate in other states. As to these plaintiffs, the regulation is not one of time, place, and manner but is a total prohibition of the dissemination of all information on the subject of alcoholic beverages.

A means less restrictive than blanket suppression has not been tried. For example, the State might appropriately require warnings of health hazards. It is not clear that an absolute prohibition of advertising is the only solution.

Weighing all of the rights and interests involved, the State of Oklahoma has a substantial interest in the health and welfare of its citizens and broad power to regulate the sale of alcoholic beverages under the Twenty-first Amendment. The State has the authority to regulate advertising that is inherently misleading or is misleading in practice. The State's power under the Twenty-first Amendment will likely support carefully drawn restrictions of advertising which are short of a total prohibition of advertising. But Plaintiffs enjoy a substantial degree of First Amendment protection which requires that the

State's regulation of commercial speech, even with the added weight of the Twenty-first Amendment, be carefully drawn to directly further the State's interest and that it be no more extensive than reasonably necessary to further the State's interest. In the absence of any allegations that the prohibited advertising is misleading, the Court finds that a total prohibition of all advertising by the plaintiffs fails to meet these requirements.

Accordingly, Defendant is hereby permanently enjoined from enforcing Article 27, § 5, of the Oklahoma Constitution and 37 O.S. § 516 (1971) against the plaintiffs and a declaratory judgment shall be entered that enforcement of these laws would violate Plaintiffs' rights under the First Amendment as guaranteed to the states by the Fourteenth Amendment to the United States Constitution.

Defendant's Motion to Dismiss is DENIED in all respects. Plaintiffs' Motion for Summary Judgment is GRANTED.

IT IS SO ORDERED this 10th day of February, 1982, NUNC PRO TUNC December 18, 1981; the Memorandum Opinion entered December 18, 1981, is withdrawn and this Memorandum Opinion is substituted therefor.

/s/ Lee R. West
United States District Judge

Date of Entry: February 10, 1982

APPENDIX H

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the Constitution of the United States provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Twenty-first Amendment to the Constitution of the United States provides:

> "Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.
>
> Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress."

Article 27, Section 5 of the Constitution of the State of Oklahoma provides:

"Sec. 5. Prohibition of sales to certain persons—Limitation on advertising—Penalties. It shall be unlawful for any licensee to sell or furnish any alcoholic beverage to:

A person under twenty-one (21) years of age; or

A person who has been adjudged insane or mentally deficient; or

A person who is intoxicated.

Sales, gifts or deliveries to persons under twenty-one (21) years of age shall be deemed a felony; and any license issued pursuant to any law, in compliance with this Amendment, shall be revoked, upon conviction for such sale, gift or delivery.

It shall be unlawful for any person, firm or corporation to advertise the sale of alcoholic beverage within the State of Oklahoma, except one sign at the retail outlet bearing the words "Retail Alcoholic Liquor Store."

Sales to insane, mentally deficient, or intoxicated persons shall be deemed a felony.

Any person under the age of twenty-one (21) years who misrepresents his age, for the purpose of obtaining the purchase of any alcoholic beverage, shall be guilty of a misdemeanor."

Section 516 of the Oklahoma Alcoholic Beverage Control Act, 37 Okla. Stat. Ann. § 516, provides:

> "Sec. 516. Advertising. It shall be unlawful for any person, firm or corporation, to advertise any alcoholic beverages or the sale of same within the State of Oklahoma, except one sign at the retail outlet bearing the words "Retail Alcoholic Liquor Store," or any combination of such words or any of them and no letter in any such sign shall be more than four (4) inches in height or more than three (3) inches in width, and if more than one (1) line is used the lines shall not be more than one (1) inch apart."

Section 111(c)(3) of the Copyright Act of 1976, 17 U.S.C. § 111(c)(3), provides:

> "(3) Notwithstanding the provisions of clause (1) of this subsection and subject to the provisions of subsection (e) of this section, the secondary transmission to the public by a cable system of a primary transmission made by a broadcast station licensed by the Federal Communications Commission or by an appropriate governmental authority of Canada or Mexico and embodying a performance or display of a work is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and sections 509 and 510, if the content of the particular program in which the performance or display is embodied, or any commercial advertising or station announcements transmitted by the primary transmitter during, or immediately before or after, the transmission of such program, is in any way willfully altered by the cable system through changes, deletions, or additions, except for the alteration, deletion, or substitution of commercial advertisements performed by those engaged in television commercial advertising

market research: *Provided*, That the research company has obtained the prior consent of the advertiser who has purchased the original commercial advertisement, the television station broadcasting that commercial advertisement, and the cable system performing the secondary transmissions: *And provided further*, That such commercial alteration, deletion, or substitution is not performed for the purpose of deriving income from the sale of that commercial time."

Section 76.55(b) of the rules of the Federal Communications Commission, 47 C.F.R. § 76.55(b), provides:

"(b) Where a television broadcast signal is carried by a community unit, pursuant to the rules in this subpart, the programs broadcast shall be carried in full, without deletion or alteration of any portion except as required by this part."

No. 82-1795

Office - Supreme Court, U.S.
FILED
NOV 17 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CAPITAL CITIES CABLE, INC.; COX CABLE OF OKLAHOMA CITY, INC.; MULTIMEDIA CABLEVISION, INC.; AND SAMMONS COMMUNICATIONS, INC.,
Petitioners,

v.

RICHARD A. CRISP, Director,
Oklahoma Alcoholic Beverage Control Board,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

JOINT APPENDIX

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November 17, 1983

Petition for Certiorari filed May 3, 1983.
Certiorari Granted October 3, 1983.

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Pursuant to Supreme Court Rule 30.1, the following documents are not reprinted in the Joint Appendix because they appear on the following pages in the Appendix to the Petition for a Writ of Certiorari:

A. Opinion of the United States Court of Appeals for the Tenth Circuit, January 24, 1983	1a
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I

RELEVANT DOCKET ENTRIES

IN THE
UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF OKLAHOMA
(NO. CIV-81-290)

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
(No. 82-1061)

and

SUPREME COURT OF THE UNITED STATES
(No. 82-1795)

RELEVANT DOCKET ENTRIES

Date	Docket Entry
March 3, 1981	Complaint
March 3, 1981	Plaintiffs' Motion for Preliminary Injunction
March 6, 1981	Preliminary Injunction Hearing
March 19, 1981	Findings and Order of District Court Granting Preliminary Injunction
April 4, 1981	Answer of Defendant
June 1, 1981	Defendant's Amendment to Answer and Motion to Dismiss Complaint
August 3, 1981	Plaintiffs' Motion for Summary Judgment
December 18, 1981	Memorandum Opinion and Order of District Court
December 18, 1981	Order of District Court Granting Permanent Injunction
December 18, 1981	Order of District Court Granting Declaratory Judgment
January 11, 1982	Defendant's Notice of Intent to Appeal to the United States Court of Appeals for the Tenth Circuit
February 10, 1982	Order of District Court Withdrawing Memorandum Opinion filed December 18, 1981
February 10, 1982	Memorandum Opinion and Order of District Court
November 15, 1982	Oral Argument Before the United States Court of Appeals for the Tenth Circuit
January 24, 1983	Opinion of the United States Court of Appeals for the Tenth Circuit
February 7, 1983	Appellees' Petition for Rehearing
March 21, 1983	Order of the United States Court of Appeals for the Tenth Circuit Denying Appellees' Petition for Rehearing

II

COMPLAINT

(March 3, 1981)

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-81-290

CABLECOM-GENERAL, INC.; COX CABLE OF OKLAHOMA CITY, INC.; MULTIMEDIA CABLEVISION, INC.; and SAMMONS COMMUNICATIONS, INC.,
Plaintiffs,

v.

RICHARD A. CRISP, Director,
Alcoholic Beverage Control Board,
Defendant.

COMPLAINT

1. Plaintiffs are corporations, duly qualified to do business in the State of Oklahoma. Plaintiffs are the holders of cable television franchises in the State of Oklahoma. Plaintiffs have franchises throughout the State including operations in at least the following counties: Canadian, Cleveland, Grady, Logan, Kay, McCurtain, Jackson, Carter, Ottawa, Oklahoma, Tulsa, Kiowa, Greer and Noble. Many aspects of plaintiffs' operations are conducted under regulations issued by the Federal Communications Commission under the Federal Communications Act of 1934, § 151, et seq.

2. Defendant is the Director and Secretary to the Board of the Alcoholic Beverage Control Board, an agency of the State of Oklahoma charged with primary responsibility for the enforcement of Oklahoma law relating to alcoholic beverages, and is sued here solely in his official capacity.

3. This Court has jurisdiction of this action under 28 U.S.C. §§ 1331, 1343. The amount in controversy exceeds the sum of $10,000.00, exclusive of interest and costs.

4. As part of their lawful service to subscribers, plaintiffs relay to the subscribers the signals of various television stations, some of which originate outside the State of Oklahoma.

5. Plaintiffs have no contractual relationship with the stations whose signals they carry, pay no fee to the stations for said signals, and have no voice in the programming carried by such stations.

6. Plaintiffs are prohibited by FCC regulations having the force of law and by the Copyright Act, 17 U.S.C. § 111(c)(3), from altering or modifying the signals of the stations they carry except as expressly permitted by such regulations. 47 C.F.R. § 76.55(b). Deletion of commercial messages from such signals would violate both the FCC regulations and the Copyright Act.

7. For many years and continuing to the present, some of the programming relayed to plaintiffs' customers has included advertisements for wine, an alcoholic beverage as defined in Article 27, § 5 of the Oklahoma constitution, and 37 O.S. § 506.

8. Said advertising is lawful where originated, and no provision of federal regulations authorizes plaintiffs to delete it from the signals relayed to plaintiffs' customers.

9. Advertisement of alcoholic beverages within the State of Oklahoma is prohibited by Article 27, § 5, Oklahoma Constitution and 37 O.S. § 516.

10. In *Oklahoma Alcoholic Beverage Control Board v. Heublein Wines, International*, 566 P.2d 1158 (Okla. 1977), the Oklahoma Supreme Court held that the constitutional and statutory advertising prohibitions required broadcast television stations to block out wine advertising in programming delivered to them by the networks.

11. On March 19, 1980, the Attorney General of the State of Oklahoma issued an opinion declaring that the prohibitions on alcoholic beverage advertising applicable to broadcast television apply similarly to cable television. In so ruling the Attorney General declined to consider the factual distinctions between cable and broadcast television.

12. Defendant has threatened cable TV operators in the State of Oklahoma, including plaintiffs, with criminal prosecution if they continue to carry programming containing alcoholic beverage advertising. Defendant's actions have included letters to all cable operators notifying them of the alleged illegality of the wine commercials as well as express oral and written threats of imminent prosecution. A written threat of prosecution directed to plaintiff Sammons Communications, Inc. is attached hereto as Exhibit "A".

13. There exists no feasible way for plaintiffs to block out the advertisements even if such action was legal under federal laws.

14. Failure to carry the out-of-state stations containing wine commercials would place plaintiffs in violation of their franchises, and would probably cause a large but inherently immeasurable reduction in plaintiffs' subscriber revenue.

15. Enforcement as threatened would irreparably injure plaintiffs.

16. As applied to plaintiffs, enforcement of the advertising prohibition as threatened would violate the provisions of the United States Constitution found in: Article VI (Supremacy Clause); Article I § 8 (Commerce clause); Amendment I (Freedom of Speech); Amendment XIV (Due Process and Equal Protection) and of 42 U.S.C. § 1983.

17. Concurrently with the filing of this Complaint, plaintiffs are filing a request for a preliminary injunction prohibiting defendant from attempting to enforce or assisting any attempted enforcement during the pendency of this action.

18. An actual case or controversy exists between plaintiffs and defendant entitling plaintiffs to a declaration of the rights between them and defendant under 28 U.S.C. § 2201 and Rule 57, F.R.C.P.

WHEREFORE, plaintiffs pray for the following relief:

1. Declaration that enforcement as threatened conflicts with the Constitution and Laws of the United States or is not authorized by Oklahoma laws;

2. Supplemental relief in the form of a preliminary injunction, to be made permanent at the close of this action, prohibiting defendant from attempting to enforce or assisting any attempted enforcement as threatened against plaintiffs.

[Signatures Deleted in Printing]

STATE OF OKLAHOMA

RICHARD A. CRISP
DIRECTOR AND
SECRETARY TO THE BOARD

ALCOHOLIC BEVERAGE CONTROL BOARD
2501 NORTH STILES—P.O. BOX 53445
OKLAHOMA CITY, OKLAHOMA 73152—AC 405/521-3484

JOAN L. BLANKENSHIP, CHAIRMAN
ALLEN B. MORAIN, VICE-CHAIRMAN
L. WINSTON BOYDSTON, MEMBER
HEBER FINCH, MEMBER
RANDALL SPEARS, MEMBER

LETTER OF CAUTION

January 14, 1981

Station Manager
Sammons Communications, Inc.
210 N. Oklahoma
Elk City, OK 73644

Dear Sir:

Information available to this office reveals that at 2:25 p.m. on January 11, 1981, Channel 6 of your Cable Television System transmitted an alcoholic beverage advertisement. This act is contrary to Article 27, Section 5 of the Oklahoma Constitution and Section 516, Title 37 O.S. 1971.

A formal complaint will not be presented to the District Attorney for the above violation at this time; however, you are advised to take those actions necessary to preclude a recurrence of the above violation. Any further violations of this nature will result in a full report being filed with the Beckham County District Attorney with a recommendation that charges be filed and prosecuted.

Sincerely,

/s/ Richard A. Crisp

RICHARD A. CRISP
Director

AN EQUAL OPPORTUNITY EMPLOYER

Exhibit -A-

Page 1 of 1 Pages

III

PRELIMINARY INJUNCTION HEARING (EXCERPTS)

(March 6, 1981)

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-81-290-W

CABLECOM GENERAL, INC.; COX CABLE OF OKLAHOMA CITY, INC.; MULTIMEDIA CABLEVISISON, INC.; AND SAMMONS COMMUNICATIONS, INC.,
Plaintiffs,

v.

RICHARD A. CRISP, Director of the Alcohol Beverage Control Board,
Defendant.

Preliminary Injunction Hearing
Had Before The Honorable Judge Lee R. West
On March 6, 1981
In Oklahoma City, Oklahoma

* * * * * * * * * * *

MR. FORD: All right. Mr. Crisp and Mr. Marnell and [26] Mr. Hammack.

(The Clerk swore a group of witnesses.)

MR. FORD: Plaintiffs would call Mr. Crisp to the stand, please.

MR. RICHARD A. CRISP,

was called as a witness, and after having been duly sworn, testified upon his oath as follows:

DIRECT EXAMINATION

BY MR. FORD:

Q. Would you state your full name for the record, please?

A. Yes. Richard A. Crisp.

Q. And Mr. Crisp, what is your job?

A. I'm currently the Director of the Oklahoma Alcoholic Beverage Control Board.

Q. As part of your duties, do you occasionally receive complaints concerning carrying of wine advertisements on cable television?

A. Yes, sir, I do.

Q. In the spring of this past year, did you request an Attorney General's opinion dealing with the lawfulness of such advertising?

A. Yes, I did.

Q. Did you subsequently receive such an opinion?

A. Yes, I did. [27]

Q. Did you subsequently distribute that opinion to what you saw as all operators of cable television systems in the State of Oklahoma?

A. I distributed—I distributed a copy of that opinion to approximately 110 cable television stations in the State of Oklahoma for their information.

Q. I will hand you what is marked as Plaintiffs' Exhibit 1 and ask: Is that a copy of your letter to one of those cable television systems?

A. Yes, sir, it is.

Q. And as far as you know, is that a correct copy of the letter you sent out?

A. Yes, it is.

MR. FORD: I move the admission of Plaintiffs' Exhibit 1.

THE COURT: Any objection, Mr. Jones?

MR. JONES: No. Your Honor.

THE COURT: Be admitted.

MR. FORD: May I question the witness from here, Your Honor?

THE COURT: Surely.

BY MR. FORD:

Q. In January of this year, did you have occasion to receive a complaint concerning carrying of a wine advertise-[28] ment for the system owned by Sammon's Communications in Elk City?

A. Yes, sir, I did.

Q. All right. Did you write them a letter of caution concerning such carrying of such advertisement?

A. Yes, sir.

Q. I will show you what's been marked as Plaintiffs' Exhibit 2 and ask you if that is a copy of the caution you sent to Sammon's in that instance?

A. Yes, sir, it is.

Q. For convenience and clarity, would you mind reading the second paragraph of that letter into the record for me?

A. "A formal complaint will not be presented to the District Attorney for the above violation at this time. However, you are advised to take those actions necessary to preclude an occurrence of the above violation. Any further violation of this nature will result in a full report being filed with the Beckham County District Attorney with a recommendation that charges be filed and prosecuted."

MR. FORD: At this time we'd move the admission of Plaintiffs' Exhibit 2.

MR. JONES: No objection, Your Honor.

THE COURT: Be admitted.

BY MR. FORD:

Q. Mr. Crisp, is it fair to state that you considered that both of those letters were sent as part of your official duties as[29] Director of the Oklahoma Alcoholic Beverage Control Board?

A. Yes, sir. I considered that.

Q. Do you consider the investigation of complaints within your duties?

A. Yes, sir, I do.

Q. And do you also consider within your duties the recommendation of criminal prosecution of people against whom complaints are made for violation of Oklahoma's prohibition of liquor advertising?

A. Yes, sir, I do.

Q. Do you consider yourself the primary official of the State of Oklahoma charged with investigating complaints and recommending criminal action in that circumstance?

A. Not necessarily, no, sir.

Q. But that is one of your primary duties, is it not?

A. Yes, sir, it is.

Q. Do you have any knowledge about the factual distinction, if any, between the way cable television systems operate and the broadcast systems operate?

MR. JONES: Objection, Your Honor. That is asking for an opinion this witness has not been qualified for.

THE COURT: He asked him if he had an opinion or any knowledge. The objection will be overruled. You may answer. He only asked you if you did have. [30]

THE WITNESS: I do have an understanding somewhat of the difference.

BY MR. FORD:

Q. Are you prepared to testify as to the differences between cable operations and broadcast operations here today?

A. No, sir.

MR. FORD: I have no further questions, Your Honor.

THE COURT: Mr. Jones?

CROSS EXAMINATION

BY MR. JONES:

Q. Mr. Crisp, you have testified you are the Director of the Oklahoma Alcoholic Beverage Control Board; is that correct?

A. Yes.

Q. What are your duties as the Director? Or let me restate that. What is the Oklahoma Alcoholic Beverage Control Board? What are the duties that it is charged with? Are you familiar with that?

A. Yes.

Q. As one of those duties, are you charged with enforcing the statutory prohibition and constitutional prohibition against advertising?

A. Yes, sir, I am.

Q. Have you ever arrested—Let me back up. Does the Alcoholic Beverage Control Board have the ability to arrest[31] parties?

A. Yes, sir.

Q. Have you ever arrested anyone with respect to the cable television companies carrying liquor advertisements?

A. No, sir, I haven't.

Q. Have you ever threatened anyone with arrest?

A. No, sir, I haven't.

Q. In that regard, Mr. Crisp, you indicated you would make a recommendation in your letter. You would make a

recommendation to the District Attorney's office. Who makes the final decision on whether prosecution would ensue?

A. Of course the District Attorney would make that decision.

MR. JONES: I have no further questions, Your Honor.

MR. FORD: No redirect, Your Honor.

THE COURT: You may step down.

THE WITNESS: Thank you, sir.

MR. FORD: Plaintiffs would call Mr. Ron Marnell.

MR. RONALD L. MARNELL,

was called as a witness, and after having been duly sworn, testified upon his oath as follows:

DIRECT EXAMINATION

BY MR. FORD:

Q. Mr. Marnell, would you state your full name for the[32] record, please?

A. Ronald L. Marnell.

Q. And by whom are you employed?

A. Multimedia Cablevision, Inc.

Q. Where is your principal place of business, you personally?

A. Wichita, Kansas.

Q. What is your job for Multimedia?

A. I'm involved with the Multimedia Divisional Headquarters that is located in Wichita.

Q. Do part of your duties involve cable television systems in the State of Oklahoma?

A. Yes, they do.

Q. Would you briefly describe to me what your duties are in connection with those systems?

A. I am involved in planning, somewhat in the operation and in a supervisory manner.

Q. Would you briefly list for me a couple of franchises that Multimedia has within the State?

A. Chickasha, Oklahoma; Moore, Oklahoma; Edmond, Oklahoma; Perry, Oklahoma.

Q. Do all of those franchises carry some out of state television signals as part of their regular programming?

A. Yes, they do.

Q. Now, what stations are carried by your system from out [33] of state?

A. All of the systems carry W.T.B.S. from Atlanta, Georgia.

Q. All right. And is that Channel 17 in Atlanta?

A. Yes, it is.

Q. Do you also carry Channel 9 from Chicago?

MR. JONES: Objection, Your Honor. He's leading the witness.

THE COURT: Sustained.

BY MR. FORD:

Q. What other stations do your systems carry, Mr. Marnell?

A. We carry the Oklahoma broadcast stations that are required by the F.C.C. and that are in proximity of the communications we operate. We do also carry stations from out of state that would be from the Dallas, Texas; Fort Worth, Texas area and from Chicago carry W.G.N., Channel 9.

Q. All right. Now, do any of those stations contain in their programming wine advertisements?

A. To the best of my knowledge, those distant stations do carry wine advertising.

Q. Are you saying some of them or all of them?

A. All of them.

Q. What role, if any in your opinion, does the carrying of [34] these out of state stations have in the financial viability of your cable systems in the State of Oklahoma?

MR. JONES: Objection, Your Honor. This witness has not been qualified as an expert in that respect to make an opinion.

THE COURT: All right. Overruled. You may answer.

THE WITNESS: The carrying of distant television stations is essential to the viability of cable operations. Cable is an alternative to the broadcast televisions available off of a household antenna. The sources of programming, in addition to what could be obtained, wholly is what makes cable television viable and where it in fact got its roots.

BY MR. FORD:

Q. Are you aware of any cable systems in Oklahoma which carry only in-state signals?

A. I'm not aware of any.

Q. There are some areas in Oklahoma which, under your understanding—some cable systems in Oklahoma which, according to your understanding, are required to carry out of state signals?

A. Yes. That's true.

Q. Are you familiar with any specific area in which that is true?

A. That becomes true in the areas of the State near the [35] border of other states where the transmitters are licensed in the adjacent state and they're within the confines provided by the Federal Communications Commission to require mandatory carriage of those signals.

Q. So is it your testimony that anything near the perimeter might be required to carry an out of state signal?

A. Yes.

Q. For instance, in the northeastern area of Oklahoma, is there any system up there which must carry out of state signals?

A. Any television system operating within the 35 mile zone of Joplin, Missouri or Pittsburgh, Kansas transmitters would be required to carry those stations even though the system was located in Oklahoma.

Q. Are you familiar that there is such a system or is not such a system up there?

A. There are systems in that area operating.

Q. All right. Do you know whether or not the stations that they are required to carry contain wine advertising?

A. I can't testify specifically to those stations in that area if they carry it. I know the Kansas stations are not prohibited from carrying it.

Q. All right. Would you briefly describe for me a typical cable operation in your system as far as staffing goes and how the system runs? Just input the signal and retransmission to[36] subscribers?

A. The television signals are acquired from a combination of means. A typical system would have potentially three input sources for programming. They would be off-air, in which case the television signal is received directly by an antenna not unlike at one's home. That signal is then connected to processing equipment which amplifies and removes interference and it is placed directly on to the cable system itself, an unattended operation.

The other means of getting a television signal on to a cable system would be via microwave relay, which is a method that the Dallas signal coming into this area, they're relayed by a common carrier microwave delivered to a head-in site, which is commonly referred to as a head-in, where the signals enter the cable television system and they're transmitted throughout the cable.

And the third source would be satellite transmission, in which a satellite antenna collects microwave signals and they are then fed head-in and distributed throughout the cable system.

Q. All right. You mentioned an unattended operation as far as receipt and retransmission of the signal. What is that mean?

A. The signal comes in as a television signal, is just amplified by a piece of electronic equipment and sent directly[37] onto the cable. It does not require an operator. There are no operators involved with head-ins. In that sense, it's not a switching facility.

Q. All right. Now, are these head-ins and head-in facilities always located at the office of the cable T.V. systems?

A. No. Typically they are not.

Q. Do cable operations in your company typically have 24 hour a day staffing?

A. No, they do not.

Q. What hours are they ordinarily open?

A. Normally 8:00 to 5:00.

Q. So does that mean that normally no one is there from 5:00 in the evening until 8:00 the next morning?

A. That's true.

Q. Now, Mr. Jones indicated that the position of the Attorney General was that cable systems could delete those commercials just like broadcast systems could. Now, do you have any facts that you think bear on that question?

A. They're not similar. The television station is an attended location and is intended for switching and insertion of other signals and other sources, whereas the channels that go on cable systems are an unattended location or simply a—the cable system acts as a continuation of a conduit, if you will, to[38] carry the signal onto the subscriber's television set.

Q. What relationship, if any, is there ordinarily between the cable T.V. system and, say, Channel 9 in Chicago that it carries?

A. We have no relationship with Channel 9 as far as our—No contracts or anything. We obtain that signal through a common carrier microwave system that—retransmission through satellite, so we have no agreement with them directly.

Q. Do you pay them anything for the signal?

A. No, we don't.

Q. Do you have any advance notice of what kind of commercials they are going to carry?

A. Absolutely not.

Q. Is Channel 9 a station that cooperates with cable operations?

A. No sir. They have typically been referred to as the reluctant super station as far as cable operations are concerned.

Q. Now, what would a cable system need in order to be able to delete these wine commercials as they came in?

A. It would be my opinion that they would need an operator to monitor the signals coming through rather than just having them come through unattended on every channel that you are going to monitor those commercials and attempt to[39] delete them as they appeared on the screen through some means.

Q. All right. Now, is what you are saying that for every signal from out of state you carry, you have to have a person watching that ready to push a button?

A. Yes, you would. You would have no other way of knowing—I mean, you wouldn't know when it was coming, so you'd have to have someone monitoring it continuously.

Q. Now, as far as out of state and independent stations go, are there any available to the satellite that don't include wine advertising?

A. No. Currently those that are distributed via satellite, there are only three available, and to the best of my knowledge, all three do carry wine commercials.

Q. Now, do you know how it is that the broadcast stations are able to delete wine commercials?

A. They are directly affiliated with the network that provides them their programming sources and have a highly cooperative nature of that contractual agreement. They are designed as an advertising medium, and the method of sharing time for the commercials dictates that they have that tight rein for notification.

Q. Now, what kind of a broadcast day, how long do these satellite stations have?

A. The satellite stations that are carried are 24 hour a day[40] stations.

Q. Is that true of the commercial networks, A.B.C., C.B.S., N.B.C.?

A. At this time it's not.

Q. Do you know how long a broadcast day those networks typically have?

A. They typically come on in the early morning in the 7:00 o'clock area and they typically end anywhere from 11:00 to 12:00 o'clock at night.

Q. Is there any difference in the number of commercials that are likely to be carried between these independent stations and network originated commercials?

A. I believe you will find the independent stations will carry a larger number of commercials than the network stations do.

Q. All right. So is it your testimony that they have a larger number of commercials and longer broadcast day?

A. Yes, they do.

Q. Now, are you aware of any of the so-called super stations, the out of state independents that are brought in, that give cable systems in Oklahoma advance notice of when wine commercials are going to show up?

A. No, they do not.

Q. What effect, if any, does that have on your opinion about the feasibility of deleting those commercials? [41]

A. It's extremely impractical to try to delete.

Q. I'm sorry. I missed that. Did you say it was impractical?

A. It's impractical, yes.

MR. FORD: No further questions.

THE COURT: Mr. Jones, with my apologies, I want—If we could, I have another rather important matter I need to

take care of that shouldn't take but just a few moments. Before you take your cross examination, could we take a brief recess? I hope it's not more than about five minutes, gentlemen.

(A recess was had, after which the following proceedings were had in open court.)

THE COURT: Be seated, please, gentlemen. I apoligize for the interruption. Go ahead, Mr. Jones. You may cross examine.

CROSS EXAMINATION

BY MR. JONES:

Q. Your name is Mr. Marnell?

A. Yes.

Q. Okay. Mr. Marnell, you have testified that there are three ways of picking up a signal; is that correct?

A. Yes. Typically that is true.

Q. I believe you said there was antenna, microwave and satellite; is that correct? [42]

A. Yes.

Q. Are all three of those considered C.A.T.V. systems by the F.C.C.?

A. I don't think I understand your question.

Q. Are all three of those types of modes of input, are they considered C.A.T.V.'s? Are you familiar with that term, sir?

A. I'm familiar with C.A.T.V. and what the Federal Communications Commission considers a cable television system, but those individual elements by themselves aren't—You know, they are what they are.

Q. Are all three forms considered cable television? The antenna, the microwave and the satellite?

A. Not of itself, no.

Q. Okay. The signal you said is received by either placing a large antenna; is that correct, or having a microwave dish to pick up a microwave signal?

A. Yes.

Q. Or by having some type of receiver from the satellite; is that correct?

A. True.

Q. These signals do not come directly to the viewer; is that correct?

A. They are carried to the viewer through a means of cable and amplifiers. [43]

Q. Okay. The signal that the cable television system is sending out is not the same signal that the cable television system is receiving; is that correct?

A. Yes. It is the same signal. It cannot—You cannot—Excuse me. You cannot alter those broadcast signals by the F.C.C. rules, so it is the same signal.

Q. Let me clarify it, Mr. Marnell. You have testified that the signal that is received by the cable television system is amplified; is that correct?

A. Yes.

Q. What else is done to that signal before it is sent out to the viewer?

A. Nothing at that point. It goes onto the cable television system for distribution.

Q. Directly a means of amplification? Do you also take out static and refine that signal before it is retransmitted?

A. Okay. I think I know where the confusion in terms is. When I said "processing," that is the amplification unit. It just takes adjacent signals out of the transmission lines so it is clean and one channel doesn't interfere with another. That is why it is called—It is processing, is what it is called.

Q. All right. During the process—or the processing [44] period, is it technologically feasible to place some sort of monitoring device in there?

A. Yes. A standard television receiver would monitor, you know, a television transmission.

Q. Okay. Between the time the signal is received, it goes into a processing; is that correct?

A. Yes.

Q. And then it is retransmitted?

A. Yes.

Q. During that processing time, is it possible to monitor that signal? Is it technologically feasible to monitor that signal before it is retransmitted?

A. You could get a—either a wave-form monitor—You could get monitors and monitor it, yes.

Q. So it is possible?

A. It would be possible to monitor.

Q. You have stated it is impractical, but it's not impossible; is that correct?

A. Yes.

Q. I believe you stated, Mr. Marnell, that cable television stations receive no revenues from advertisements; is that correct?

A. They receive no revenues from the advertisements that are carried on those broadcast stations, no, they do not.

Q. So as far as an economic effect, whether or not that advertisement is shown does not really touch that cable tele-[45] vision company; is that correct?

A. The advertisement? We get no revenue from those advertisements, no.

Q. So you're not affected whether the commercial is shown or not in an economic sense; is that correct?

A. I guess that would be true.

MR. JONES: I have no further questions, Your Honor.

MR. FORD: Just a few questions on redirect.

REDIRECT EXAMINATION

BY MR. FORD:

Q. Now, Mr. Jones was talking some about processing and the time during which processing takes place. Is there any

delay between the time the signal comes in and when it is retransmitted to the viewers?

A. No. They are instantaneous. The viewer is seeing it at their home at the same time you would see it at the editing site.

Q. So you weren't implying that there was any time in which something could be done to that signal?

A. No.

Q. Now, you also talked about the three types of signals, microwave and satellite and et cetera, and he asked if those were cable T.V. systems. Now, are those all three means of receipt that cable T.V. systems use? [46]

A. They are sources of signals that cable systems utilize, yes.

Q. The use of any one of those systems doesn't prevent you from being a cable T.V. system under Federal Communications regulations?

A. No.

Q. Now, you testified that you don't get any economic benefit from those wine commercials being included in the telecast; is that correct?

A. That's true. We get no revenues from those advertisers.

Q. Would there be an economic effect on you if you were required to take them out?

A. Yes. A very heavy economic effect would be in the ability to remove those commercials.

Q. Now, is that what we talked about on direct, having someone sitting there to push a button for each station you carry 24 hours a day?

A. Yes, it was.

MR. FORD: No further redirect.

RECROSS EXAMINATION

BY MR. JONES:

Q. Mr. Marnell, with respect to deleting, you indicated that the signal is brought down, processed and retransmitted and that takes place instantaneously; is that correct? [47]

A. Yes, it does.

Q. Are you familiar with how regular broadcasters operate?

A. I'm not a broadcaster, but I am in a general sense familiar with it, yes.

Q. Are you familiar with how they go about blocking out signals?

A. In a general sense, yes.

Q. Is that a signal that is simultaneously being received and transmitted?

A. At portions of the time, it is, yes.

Q. So it's possible then for C.B.S., N.B.C., A.B.C., one of the national networks, to send a signal and that signal is being transmitted at the same time it's being received by the local affiliates; is that correct?

A. That's true.

Q. And the local affiliates does have the capability for blocking a portion of that signal as needed; is that correct?

A. Yes. When he knows precisely when that signal will be there and has the facilities to do so and the manpower to effect it.

Q. Do the national networks ever make any changes in their advertising schedules from what they publish? Do they [48] ever deviate?

A. I would assume they do.

Q. And if that were the case, isn't it possible for a wine commercial to be shown at the national level that the local affiliate would not be aware of?

A. I would think that could happen.

Q. And don't you think the local affiliate would have someone to monitor for that specific purpose?

A. I don't think I can answer that. I don't know how they handle that.

Q. Okay. As far as the economic impact, you receive no revenues from advertising and yet you have indicated there would be an impact if you were called upon to delete those advertisements; is that correct?

A. The economic impact would be if we deleted those advertisements, if we were the ones required to do it. If they simply didn't appear on the channel, then we would not have an economic impact because we have no income from those advertisements.

Q. Do you have any viewers that watch cable television specifically to see wine commercials?

A. I would think that would be unlikely would be my answer.

Q. Do you think that you would suffer a loss of viewers if wine commercials were deleted from the signals that you are[49] retransmitting?

A. From purely the deletion of the commercial itself, I wouldn't think so.

MR. JONES: I have no further questions, Your Honor.

MR. FORD: Thank you, Mr. Marnell.

THE COURT: Let me ask Mr. Marnell a question or two.

THE WITNESS: Yes, sir.

THE COURT: You are with Metromedia?

THE WITNESS: Multimedia.

THE COURT: Multimedia? I apologize, Mr. Marnell. What states does your—Your principal place of business is in Wichita?

THE WITNESS: Yes.

THE COURT: And how many states do you have cable T.V. into?

THE WITNESS: We currently have cable television operations in Oklahoma, Kansas, Illinois and North Carolina.

THE COURT: All right. Do any of those states have comparable either constitutional or statutory prohibitions against the advertising of wines?

THE WITNESS: To the best of my knowledge, they do not, Your Honor. [50]

THE COURT: No other state, to the best of your knowledge, has threatened or inferred or implied that you will or might be prosecuted for failure to delete or refrain from those wine advertisings to your knowledge?

THE WITNESS: To my knowledge, this is the only case. This is the only one.

THE COURT: Okay. The matter hasn't come up so far as you know in any other state?

THE WITNESS: No, it has not.

THE COURT: All right. Fine. Any further questions, gentlemen, as a result of my questioning?

MR. FORD: No.

THE COURT: Go ahead, Mr. Jones.

RECROSS EXAMINATION (Continued)

BY MR. JONES:

Q. Mr. Marnell?

A. Yes.

Q. Are you familiar with whether or not any pornographic materials are ever shown on cable television?

MR. FORD: Your Honor, I will object to this as being irrelevant, although I really don't mind hearing it too much, but I don't think it's relevant to this proceeding.

MR. JONES: I think it's relevant, Your Honor, in that if we carry the Plaintiffs' argument to its natural— [51]

THE COURT: Are you talking about pornographic advertising or—

MR. JONES: Any type of pornographic materials which would violate the community standards of the State of Oklahoma. If you take the Plaintiffs' argument to its natural conclusion, then you could indicate that they don't have any affect on any signals which are received, so if pornographic—

THE COURT: They're only transmitting, as I understand it, signals that are transmitted by the major networks, received in some other source, and so I think that the question is irrelevant because those are controlled by F.C.C. regulations and so forth.

MR. JONES: Theoretically it would be possible, Your Honor, for the Atlanta station or Chicago station to show some kind of programming that might comply with the community standards there but be in violation of the obscenity laws here. And I was just wondering if in fact they have any means of monitoring to preclude showing a program here that would violate our standards.

THE COURT: All right. I think we are getting outside the issues that are before us here, which is difficult enough—

MR. JONES: Okay, Your Honor. [52]

THE COURT: —without getting the pornography involved. All right. Do you have any further questions?

MR. FORD: No further questions, Your Honor.

THE COURT: You may step down, Mr. Marnell.

MR. FORD: We call Mr. Wilbur Hammack.

MR. WILBUR L. HAMMACK,

was called as a witness, and after having been duly sworn, testified upon his oath as follows:

DIRECT EXAMINATION

BY MR. FORD:

Q. Mr. Hammack, would you state your full name for the record, please?

A. My name is Wilbur L. Hammack.

Q. Mr. Hammack, by whom are you employed?

A. I'm employed by Cablecom-General, Inc.

Q. What is your position with Cablecom?

A. I'm an Area Manager in Altus, Oklahoma.

Q. What are your responsibilities as Area Manager?

A. I'm in charge of the operations of six cable systems three of them in Oklahoma, Altus, Mangum and Hobart, Oklahoma.

Q. How long have you been in the cable television business?

A. Since 1957. In the Altus area since 1958.

Q. Now, are either of the stations in Oklahoma that are subject to your jurisdiction required to carry an out of state[53] signal as part of their programming?

A. Yes. Mangum—I mean Hobart and Altus are required to carry two stations out of Wichita Falls. They are called significantly viewed channels.

Q. Now, is there any prohibition that you know of against those stations carrying wine advertising?

A. None that I know of.

Q. Does your—Do your stations carry any other out of state signals?

A. Yes. We carry Channel 11 from Dallas-Fort Worth. We have carried that since about 1973. One of our company's systems, they have carried it long before that. I'm not sure, but I think it's back in the early '60's sometime. We carry W.T.B.S. in Atlanta and we also carry W.G.N.-Chicago, Channel 9.

Q. Does Channel 11 out of Dallas-Fort Worth include wine advertising as part of its commercials?

A. I have seen wine commercials on their station, yes.

Q. Would you briefly describe for me what the staffing you have at the Mangum and Hobart locations is?

A. I have one man in each town who is the manager, the technician, the installer, the community relation man and everything.

Q. Is that true in both of those towns? [54]

A. Yes, it is.

Q. Does he work 24 hours a day?

A. Well, I certainly hope not.

Q. All right. Would you briefly describe for me what the facilities you have for receiving and retransmitting signals are in Hobart and Mangum?

A. We have 400 foot towers in each instance. We have antennas at the top of the tower which receives signals from Channels 3 and Channel 6 out of Wichita Falls. They are then processed in a piece of equipment inside the tower building, amplified, put into the cable system. We receive some satellite signals, W.G.N., Atlanta from a satellite receiver, by microwave. We bring in Channel 11 and Channel 39 out of Dallas-Fort Worth, and they are processed—each are processed slightly different, but mainly in the same way and put at the proper levels into the cable system whereby they are transmitted throughout the system into the cable subscriber's home.

Q. Now, are there personnel that are stationed out there at that tower building where the signal is retransmitted?

A. No, sir. Many of our locations are extremely remote. Our microwave locations, for instance. The towers in those towns are anywhere from a mile and a half, two miles to three miles outside the city limits.

Q. Is there any way your office manager in Hobart or Mangum sitting there in his office could modify that signal [55] before it is retransmitted?

A. No. Our offices are in town and they have a cable running into the office, just the same as our cable subscriber would be anywhere in the town. They can look at the picture on a television set and that is all.

Q. Now, who would be impacted if you were required to cease carrying those out of state stations?

A. Well, our subscribers would be deprived of the signals that they learned to like very much, some of the older movies and sports programming on these stations that are distant, and I'm afraid we'd have a very unhappy group of people in any of those towns if we were to have to remove those signals.

Q. Have you promised to carry those signals to those people?

A. Yes, we have. Most definitely.

Q. In fact, is that promise in your franchise agreement with those cities?

A. Yes, it is.

Q. Are you aware of any cities in Oklahoma where if they were forbidden from carrying out of state signals that they'd just simply have no television at all?

A. Well, I think definitely there would be some towns. I can think of primarily of Guymon, Oklahoma. Our company has for years served that town with microwave service from the [56] three television signals out of Amarillo, Texas, and until recently, when the Oklahoma Educational Television Authority built a series of translators across the Panhandle of Oklahoma out in that direction, they had nothing except the microwave signals our company furnished them out of Amarillo, Texas which could—I don't know that they did advertise wine advertisements. I think in Guymon they did have a station out of Kansas, a satellite. That is called a satellite. Not from a satellite out in space, it's just a station that retransmits signals I believe of Wichita, Kansas. But I'm not certain.

Q. Now, do your systems have any contractual relationship with the stations whose signals they carry?

A. None whatsoever.

Q. Do you send a check to those stations to pay them for carrying their signal?

A. No, sir, we do not.

Q. Do they ever consult you on the programming they carry?

A. No, sir, they do not.

Q. Now, do you have any way of knowing in advance what commercials are going to be carried or when?

A. Never.

Q. Do you have any kind of a teletype hookup with the stations you carry so that they could tell you if they were[57] changing their schedule?

A. None.

Q. Do you know whether broadcast stations do, the network affiliates?

A. I understand they do. They have some kind of a communication that comes into them from networks telling them what commercials may be coming up in case they have to delete them. That is only hearsay. I don't know it firsthand.

MR. FORD: All right. That's all the questions I have, Your Honor.

CROSS EXAMINATION

BY MR. JONES:

Q. If I understand you correctly, Mr. Hammack, you have several franchises that you operate as a cable television company; is that correct?

A. Yes, sir.

Q. In those franchise agreements, who are they normally with?

A. With the local government entity.

Q. Are you talking about the municipality?

A. That's right.

Q. Do those agreements purport to exclude you from the prohibition against liquor advertisements?

A. Would you say that again, please?

Q. Does your franchise agreement immunize you or[58] exempt you from the prohibition against liquor advertisements in the State of Oklahoma?

MR. FORD: Your Honor, I believe we'd be willing to stipulate that none of these franchises have a provision in them that says this exempts you from the laws of the State of Oklahoma regarding liquor advertising.

THE COURT: Let the record so show.

BY MR. JONES:

Q. Mr. Hammack, you say that you have no staffs on outlying towers; is that correct? Antennas?

A. No, sir.

Q. Are you saying it's impossible to have someone to staff those, if necessary?

A. I would say it would be impractical, not impossible.

Q. The question was: Is it impossible, sir?

A. No, it's not impossible.

MR. JONES: I have no further questions.

MR. FORD: No redirect, Your Honor.

THE COURT: Mr. Hammack, let me ask you a question or two: How many counties in the State of Oklahoma does your company serve?

THE WITNESS: I can tell you the cities easier, I believe.

THE COURT: Okay. [59]

THE WITNESS: We have a cable system in Ponca City; Miami, Oklahoma; Ardmore, Oklahoma; Idabel, Mangum, Hobart and Altus.

THE COURT: Pretty well ring the state then, don't you, to some degree?

THE WITNESS: Yes. We started in the outlying areas. That is where cable began.

THE COURT: Have any charges been filed against you for violating the state prohibition against liquor advertising?

THE WITNESS: No, sir.

THE COURT: Have any been—Has any District Attorney or local governmental entity indicated to you that they were considering the filing of charges?

THE WITNESS: No, sir, they have not.

THE COURT: To your knowledge, has any other cable television company operating in the State of Oklahoma, has it been prosecuted under this—for violation of this prohibition?

THE WITNESS: I only know that Elk City was put on caution, not prosecuted.

THE COURT: Elk City was put on caution?

THE WITNESS: Yes.

THE COURT: Was that by the letter that—

THE WITNESS: Yes. [60]

THE COURT: —that's been referred to?

THE WITNESS: I had heard about it.

THE COURT: In Beckham County?

THE WITNESS: Yes. I had heard about it before I saw the letter.

THE COURT: That was a letter from the Alcoholic Beverage Control Board; is that correct?

THE WITNESS: Yes, sir.

THE COURT: Do you know whether the local District Attorney ever indicated to them any intention to prosecute that or not?

THE WITNESS: No, I do not.

THE COURT: You don't know? You don't have any personal knowledge?

THE WITNESS: No, I don't.

THE COURT: Gentlemen, do either of you have any questions with regard to this witness since I have examined him?

MR. FORD: No, Your Honor.

MR. JONES: No, sir.

THE COURT: You may step down. See if Mr. Ford has additional witnesses?

MR. FORD: Your Honor, just a brief—We don't have any more witnesses, Your Honor, so that this point we would rest as far as our presentation. [61]

* * * * * * * * *

IV

ORDER OF THE SUPREME COURT OF THE UNITED STATES GRANTING THE PETITION FOR A WRIT OF CERTIORARI

(October 3, 1983)

Supreme Court of the United States

No. 82-1795

CAPITAL CITIES CABLE, INC.; COX CABLE OF OKLAHOMA CITY, INC.; MULTIMEDIA CABLEVISION, INC.; and, SAMMONS COMMUNICATIONS, INC.,
Petitioners,

v.

RICHARD A. CRISP, Director,
Oklahoma Alcoholic Beverage Control Board,
Respondent.

Order Allowing Certiorari. Filed October 3, 1983.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted.

In addition to the Questions Presented by the petitioners, the parties are directed to brief and argue the following question:

"Whether the state's regulation of liquor advertising, as applied to out-of-state broadcast signals, is valid in light of existing federal regulation of cable broadcasting."

No. 82-1795

Office - Supreme Court, U.S.
FILED
JUN 27 1983
ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

CAPITAL CITIES CABLE, INC.; COX CABLE OF OKLAHOMA CITY, INC.; MULTIMEDIA CABLEVISION, INC.; AND SAMMONS COMMUNICATIONS, INC.,

Petitioners,

vs.

RICHARD A. CRISP, DIRECTOR, OKLAHOMA ALCOHOLIC BEVERAGE CONTROL BOARD,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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June, 1983

No. 82-1795

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

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June, 1983

QUESTION PRESENTED

May the State of Oklahoma, in pursuit of its policy of promoting temperance, prevent cable television operators from distributing within the State advertisements which promote the increased consumption of intoxicating liquor products?

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

No. 82-1795

CAPITAL CITIES CABLE, INC.; COX CABLE OF OKLAHOMA CITY, INC.; MULTIMEDIA CABLEVISION, INC.; AND SAMMONS COMMUNICATIONS, INC.,

Petitioners,

vs.

RICHARD A. CRISP, DIRECTOR, OKLAHOMA ALCOHOLIC BEVERAGE CONTROL BOARD,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

In 1959, Oklahomans voted to repeal prohibition, but provided constitutional and statutory safeguards for the strict regulation of the State's new liquor industry. Respondent herein is the Director of the agency charged with the enforcement of those laws regarding all aspects of the sale and distribution of alcoholic beverages. Subsequent to the referendum and the enactment of constitutional and statutory provisions specifically denying the right to advertise liquor, including wine, Respondent has prohibited, within its means, all forms of liquor advertising from all sources, both interstate

and intrastate. At the present time, the only advertising allowed includes certain limited signs within retail package store premises and one sign identifying retail package stores. Because of the difficulty of enforcement with regard to liquor ads included out-of-state print publications, the Board has not been able to pursue prosecution of those violations.

The constitutional and statutory provisions concerned here are:

> Okla. Const. Art. 27, § 5, in pertinent part
>
> "It shall be unlawful for any person, firm or corporation to advertise the sale of alcoholic beverage within the State of Oklahoma, except one sign at the retail outlet bearing the words 'Retail Alcoholic Liquor Store.'"

> 37 O.S.1981, § 516
>
> "It shall be unlawful for any person, firm or corporation to advertise any alcoholic beverages or the sale of same within the State of Oklahoma, except one sign at the retail outlet bearing the words 'Retail Alcoholic Liquor Store,' or any combination of such words or any of them and no letter in any such sign shall be more than four (4) inches in height or more than three (3) inches in

width, and if more than one (1) line is used the lines shall not be more than one (1) inch apart."

The Petitioners are cable service operators whose systems enable Oklahomans to receive out-of-state television programming. Such cable programming has included wine advertisements in violation of Oklahoma law. Most programming containing such ads is carried as a result of discretionary choices by Petitioners themselves and not as a result of Federal Communications Commission's (FCC) prohibition of commercial deletions or "must-carry" rules (Petition for Writ, p. 3). Petitioners also indicate that most of their concerns are primarily matters of convenience and cost (Writ for Certiorari, pp. 19 and 20, footnote 39).

District Court Proceedings

Following Respondent's confirmation that 37 O.S. 1981, §516 would be enforced as to cable operators, Petitioners filed an action asking for a declaratory judgment as to the constitutionality of Oklahoma's liquor advertising ban. A preliminary injunction was then issued in favor of Petitioners and subsequently, summary judgment was entered based upon the trial court's reasoning that such a ban was an infringement of Petitioner's First Amendment rights.

Court of Appeals Decision

On appeal, the Tenth Circuit reversed, holding that the advertising ban did not violate Petitioner's rights even though the advertisements pertained to lawful activity and were not inherently misleading. The Court held as a matter of law that a prohibition on such advertising was reasonably related to reducing the sale and consumption of alcohol and its attendant problems. Okla. Telecasters Assoc., et al. v. Crisp, 699 F.2d 490 (10th Cir. 1983). Relying on Queensgate Investment Co. v. Liquor Control Commission, ___ U.S. ___, 103 S. Ct. 31, 74 L. Ed. 2d 45 (1982), the Court of Appeals further held that to the extent that the same constitutional issues were presented therein, that decision was binding. Okla. Telecasters Assoc., supra.

However, the Court of Appeals also independently applied the four-part commercial speech test established by Central Hudson Gas & Elec. Corp. v. Public Service Commission, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980). The Circuit Court thus found the means of regulation chosen by the Legislature to be inherently valid acts under Oklahoma's police power which directly advanced substantial state interests. Finally, the means chosen were held to be no more extensive than necessary. The Court of Appeals emphasized that the proper resolution in cases such as this requires a careful balancing of interests. In so doing,

the Court was not rejecting any particular standard of review, but was describing the analytical process necessary when Courts must choose between conflicting State and federal interests of similar importance.

REASONS FOR DENYING THE WRIT

I. AN EN BANC PANEL OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT HAS VACATED THE OPINION OF THE ORIGINAL PANEL IN THE CASES OF LAMAR OUTDOOR ADVERTISING, INC. V. MISSISSIPPI STATE TAX COMMISSION, 701 F.2d 314 (5th Cir. 1983) AND DUNAGIN V. CITY OF OXFORD, MISS., 701 F.2d 335 (5th Cir. 1983), AND, CONSEQUENTLY, THERE EXISTS NO CIRCUIT COURT OF APPEALS DECISION WHICH IS IN CONFLICT WITH THE OPINION OF THE TENTH CIRCUIT COURT OF APPEALS IN THIS CASE.

The Petitioners contend that the decision of the Tenth Circuit Court of Appeals, below, is in conflict with that of the Fifth Circuit Court of Appeals in the cases of Lamar Outdoor Advertising, Inc. v. Mississippi State Tax Commission, supra, and Dunagin v. City of Oxford, Miss., supra. However, the Fifth Circuit has ordered that both of these cases be reheard en banc.

Lamar, supra, 701 F.2d at 335; Dunagin, supra, 701 F.2d at 336 (5th Cir. 1983).

Under the rules of the Fifth Circuit in this situation, "the effect of granting a rehearing en banc is to vacate the panel opinion and judgment of the Court and stay the mandate." U.S. Ct. of App., 5th Cir., Rule 17. This fact is conceded by the Petitioners in their Petition for a Writ of Certiorari, p. 18, n. 34. It follows that the conflict between the Circuits of which the Petitioners complain simply does not presently exist.

II. THERE IS NO SUBSTANTIAL FEDERAL QUESTION FOR CONSIDERATION BY THIS COURT.

One of the criteria for assumption of jurisdiction by this Court on a Writ of Certiorari is the existence of a substantial federal question. See, Miller v. California, 418 U.S. 915, 94 S. Ct. 3206, 41 L. Ed. 2d 1158 (1974) (Douglass, J., dissenting). Such a question is not presented by the case at bar.

With the repeal of the Eighteenth Amendment to the United States Constitution in 1933, the national prohibition of alcoholic beverages was eliminated. In its stead, the Twenty-First Amendment allowed regulation by State of the transportation or importation of such beverages within its borders. Until 1959, Oklahoma countinued its blanket prohibition of alcohol.

Passage of State Question No. 386 in that year indicated the people's reaffirmation of the desirability restrictive regulations of all aspects of the sale and distribution of liquor, including advertising.

Oklahoma has accepted its responsibility under the Twenty-First Amendment to protect the health and welfare of its citizenry from the problems associated with the use of intoxicating liquor. Inherent in that police power is the authority to regulate such substances which are highly capable of or subject to abuse. Such regulations, to be effective, must to some degree affect other personal and public, interstate and intrastate rights and privileges.

Petitioners herein intercept and deliver television programming into the State of Oklahoma. In so doing, they have occasion to transmit commercial messages about a myriad of subjects, including the sale and consumption of alcoholic beverages. Petitioners urge that because they are unable to transmit such advertising without limitation into Oklahoma, a significant and substantial constitutional infringement has occurred.

The more correct characterization would be that the Petitioners are only incidentally and nominally affected by Oklahoma's ban on liquor advertising. Petitioners herein are not prohibited from transmitting all other types of programming into Oklahoma, including all other commercial messages. They remain virtually

unaffected in their general exercise of any alleged commercial speech rights.

Petitioners further intimate that Oklahoma's liquor advertising regulations establish a sweeping ban on commercial speech. To the contrary, Oklahoma's regulation of liquor advertising is not applicable to any other legal substance available to the consumer in this State or elsewhere. Narrowly drawn and territorially limited, said regulation does not prohibit the transmission of necessary information to the consumer, such as price and availability of products needed by consumers, as Petitioners contend. It simply restricts the artificial stimulation of consumption of alcoholic beverages by exaggerated displays of the "good life" for the sole commercial benefit of those who serve to profit from that increased usage.

In light of these circumstances, the Tenth Circuit properly considered, as dispositive, this Court's summary affirmation of the appeal in Queensgate, supra. The jurisdictional statement in that case as cited by the Tenth Circuit in Telecasters, supra, 699 F.2d at 494, posed only the issue of whether the regulation therein, forbidding off-premises price advertising, was violative of the First and Fourteenth Amendments. This Court properly dismissed that appeal "for want of a substantial federal question" and a similar disposition is proper in the instant case. Queensgate, supra.

Taken in the context of the other decisions rendered by this Court regarding the interplay of these particular interests here at stake, the Tenth Circuit reached the inevitable conclusion that Oklahoma was exercising the proper State authority under its own police power and that granted by the Twenty-First Amendment. In California v. LaRue, 409 U.S. 109, 93 S. Ct. 390, 34 L. Ed. 2d 392 (1972), it has been recognized that the Twenty-First Amendment conferred additional State authority to regulate the sale and consumption of alcoholic beverages. Also important is the State's concomitant power to regulate the circumstances under which liquor may be sold, New York State Liquor Authority v. Bellanca, 452 U.S. 714, 101 S. Ct. 2599, 69 L. Ed. 2d 357 (1981), and the extensive discretion authorized as to the means of regulation employed, Ziffrin, Inc. v. Reeves, 308 U.S. 132, 60 S. Ct. 163, 84 L. Ed. 2d 128 (1939).

Oklahoma does not contend that the existence of a Twenty-First Amendment interest in this case preempts all other considerations. Oklahoma does assert that the artificial stimulation of the consumption of alcoholic beverages within its territory is a matter of substantial State concern, and that in the final analysis, any affected federal or constitutional right does not present any justification for further federal intervention. Thus, the matters presented by the Petitioners

for review, though touching upon certain concerns in the federal realm, nonetheless fail to offer federal substantive questions worthy of consideration by the United States Supreme Court. As in Queensgate, supra, this Court should decline to further exercise jursidiction in this matter.

III. THE TENTH CIRCUIT COURT OF APPEALS RESOLVED THE ISSUES IN THE CASE BELOW BY APPLICATION OF THE CORRECT CONSTITUTIONAL BALANCING TEST AND WEIGHED THE PROPER VALUES IN THE CONDUCT OF THAT BALANCING. ACCORDINGLY THIS CASE PRESENTS NO REAL DISPUTE REGARDING CONSTITUTIONAL DOCTRINE, AND, THEREFORE, THE ISSUES PRESENTED ARE NOT OF SUCH WIDE-SPREAD INTEREST AND IMPORTANCE AS TO WARRANT HEARING BY THE SUPREME COURT.

The most striking feature of the Petitioners' First Amendment arguments opposing Oklahoma's ban on liquor advertising is their consistent failure to recognize the "common sense" distinctions between the degree of constitutional protection afforded most forms of expression and the substantially reduced protection available in cases of regulated "commercial speech."

Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, 425 U.S. 748, 771, n. 24, 96 S. Ct. 1817, 1830, 48 L. Ed. 2d 346 (1976). Rather, Petitioners' arguments are composed on the basis of a curious amalgam of both commercial and noncommercial speech cases, with the addition of some indirectly posed questions implicating the Copyright Act of 1976, 17 U.S.C. §§ 101 et seq., and certain regulations of the FCC found at 47 C.F.R., pt. 76. Although the Petitioners are apparently loath to say so directly, they suggest that because of these latter federal regulations of cable television commercials, concepts of federal supremacy and preemption would prevent Oklahoma from prohibiting liquor ads on cable television, even if the prohibition were a permissible State regulation under the commercial speech doctrine.

However, all of the Petitioners' contentions are belied by a single, simple truth: The State regulation before us is entitled to special deference because it has been imposed pursuant to Oklahoma's special regulatory power existing under the Twenty-First Amendment, § 2. Because of this fact, combined with Oklahoma's undeniable interest in the promotion of temperance among the people of the State, it is only in very narrow and special circumstances, not present here, that any assertion of a federally protected interest, be it constitutional, statutory or regulatory, could be held to overcome

Oklahoma's right to combat influences tending to increase the use of liquor products, and to abate the abuses and public health problems necessarily attendant upon such increased usage.

Under the precedents of this Court, discussed below, it matters not at all whether the federal interest opposing the State liquor regulations arises under the First Amendment's protection of commercial speech, under the congressional power to regulate commerce, as reflected in FCC regulations, or even under its power to reserve "to Authors . . . the exclusive right to their respective writings . . . ." U.S. Const. Art. I, § 8. In each and every such event, what is required is that the State's regulatory policy, which is entitled to substantial deference, be balanced against the federal regulatory interest or constitutional right at stake. Furthermore, these cases show that in each such instance, regardless of the nature of the federally protected interest opposing the State liquor regulation, any such regulation should be deemed valid if supported by substantial State interests which are directly advanced by the regulation, except where the regulations sweep much broader than the State interest requires.

This balancing methodology represents the standard for review for all commercial speech questions, Central Hudson Gas & Elec. Corp. v. Public Service Comm. of New York,, 447 U.S. 557, 567, 100 S. Ct.

2343, 2351, 65 L. Ed. 2d 341 (1980), as well as for cases involving tension between State liquor regulations and other federally protected regulatory interests. See, California Retail Liquor Dealers Assoc. v. Midcal Aluminum, Inc., 445 U.S. 97, 113-114, 100 S. Ct. 937, 946-947, 63 L. Ed. 2d 233 (1980) (Sherman Act, 15 U.S.C. §§ 1 et seq., and commerce power); Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 101 S. Ct. 2882, 2899, n. 25, 69 L. Ed. 2d 800 (1981) (Due Process Clause, U.S. Const., Fourteenth Amendment). The implication of these cases is that so long as Oklahoma's liquor regulation directly serves its interest in suppressing liquor consumption and does not reach further than necessary to serve that substantial and important interest, then it should stand, even though opposed by the federally protected interest in the free flow of commercial information, by the Commerce Clause, by any Commerce Clause regulation or by copyright legislation.

The ability of a State liquor regulation to withstand a challenge that it conflicts with otherwise valid and supreme federal law is clearly reflected in the analytical methodology utilized by this Court in one such recent case. California Retail Liquor Dealers Assoc. v. Midcal Aluminum, Inc., supra. At issue in Midcal was the inherent tension between a State statute requiring wine producers and wholesalers to do

business under fair trade contracts or price schedules, on the one hand, and, on the other, the federal proscription of restraints of trade embodied in the Sherman Antitrust Act, 15 U.S.C. §§ 1 et seq.

In an ordinary case where the State regulation did not implicate the State's special powers under the Twenty-First Amendment, it seems that the federal Commerce Clause interest would in any event supersede the conflicting State regulation. Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 329, 84 S. Ct. 1293, 1296, 12 L. Ed. 2d 350 (1964). However, where, as here, a State undertakes a regulation on the basis of its Twenty-First Amendment powers, the State regulation should nevertheless be sustained where it serves a substantial State interest in a direct manner.

In Midcal, the State regulation was not upheld, but this was because the Court found no direct relationship between resale price maintenance and either of the State interests: temperance and protection of small business from predatory pricing practices of large retailers. Midcal, supra, 445 U.S. at 113-114, 100 S. Ct. at 947. However, the very fact that the Court even scrutinized the relationship between the State's goals and the effect of its regulations demonstrates that a State liquor regulation serving substantial State interests in a direct manner should be upheld even in the face of a direct conflict with a proper federal law or regulation.

From the substantial deference accorded to State liquor regulations in Midcal and related cases, and especially in light of the factors deemed worthy of balancing by this Court in such cases, it appears that if a State regulation can withstand an attack mounted on the basis of the commercial speech doctrine, and is, additionally, undertaken in pursuit of the State's Twenty-First Amendment interests, then a fortiori, such regulation cannot be overcome by a showing that it conflicted with other federal law. Put more directly, if Oklahoma's ban of liquor advertising can withstand even the force of the First Amendment, then surely it must be proof, as well, against other federal regulations of television commercials.

This reasoning, then, necessarily leads to a consideration of whether the Tenth Circuit Court of Appeals correctly concluded that Oklahoma's ban on liquor advertising exists to serve a substantial interest of the State in a direct manner, without undue restraint. By and large, the opinion below eloquently speaks for itself in this regard.

The Circuit Court certainly reached the only conclusion possible on the question of the substantiality of Oklahoma's interest which is served by the ban on liquor advertising in the State. The promotion of temperance and the discouragement of practices tending to increase the use of intoxicants in the State are

governmental goals which serve a variety of public health and safety interests. See, Ziffrin Inc. v. Reeves, 308 U.S. 132, 138-139, 60 S. Ct. 163, 167, 84 L. Ed. 128 (19[illegible]. It cannot be gainsaid that among these is the State's legitimate and substantial interest in the promotion and preservation of traffic safety, an area where many problems are directly the result of the use and abuse of liquor.

The existence of this traffic safety interest supporting the liquor advertising ban is particularly instructive in this case, because just such a government interest, bolstered only by an asserted interest in esthetics, was held by this Court to justify a total prohibition of all commercial billboard advertising in the case of Metromedia, Inc. v. City of San Diego, supra. Surely, Oklahoma's interest in promoting traffic safety by discouraging increased use of intoxicants is not less substantial than San Diego's similar interest in promoting such safety through the suppression of driver distractions. Of course, traffic safety is only one of the important public health and safety interests furthered by Oklahoma's constitutional and statutory policy of promoting temperance. As the Circuit Court of Appeals correctly recognized, Oklahoma also has other important interests, including promotion of family stability and work force productivity, which are advanced by the State policy of promoting temperance.

The Circuit Court also correctly concluded that a ban on liquor advertising bears a direct relationship to Oklahoma's very substantial interest in discouraging the use of intoxicants. Were it not that this very point has been in litigation for over two years, it would hardly appear open to question that a ban on promotional advertising of liquor directly advances the State's interest in discouraging liquor consumption. The direct relationship is patent, and no one who has ever viewed a wine advertisement on television could possibly conclude that the commercial served any purpose other than promoting increased sales and consumption of the product.

The District Court, of course, found the ties between the State's interests and the means chosen to advance them to be insufficiently direct. But as the Circuit Court observed, the limited scrutiny of commercial speech regulations permitted under the four-step Central Hudson test does not permit Courts to conduct a free ranging search to find if other, even more direct means of furthering State interests might be found. Such scrutiny of legislative wisdom is not consistent with the substantial deference to which a State regulation of commercial speech is entitled. See, Cablecom-General, Inc. v. Crisp, 699 F.2d 490, 500 (10th Cir. 1983).

The final inquiry under the Central Hudson test is whether the challenged regulation reaches further than necessary to serve the State's interest in the promotion of temperance. Since only liquor ads are banned and all such ads promote that which the State clearly has the right to discourage, it appears that the Circuit Court was clearly correct in finding that the regulation did not reach too far. There is, after all, nothing inherently suspect in any complete prohibition of a specific form of advertising providing it directly advances a substantial State interest, even where this could result in the total destruction of an entire advertising industry in the locale. Metromedia, supra, 453 U.S. at 497, 508, 101 S. Ct. at 2887, 2893.

The foregong discussion illustrates that there is nothing in the disposition of this case by the Tenth Circuit which merits further consideration by this Court. The Court of Appeals plainly utilized the correct constitutional tests in assessing Oklahoma's liquor advertising prohibition. The Court balanced the proper factors, and accorded to the State's policies the substantial deference which is appropriate both because this is a case involving regulation of mere commercial speech and because of the State's substantially enhanced regulatory power under the Twenty-First Amendment.

It is the substantial importance of the State's interest in promoting temperance and the direct relationship between that interest and the means chosen to advance it which overcome the federal interest in the free flow of commercial information. Moreover, because the advertising ban also serves the State's special concerns under the Twenty-First Amendment, these same considerations overcome what are argued to be conflicting federal regulations regarding television commercials carried by cable systems. This latter result was also recognized, at least implicitly, by the Court of Appeals.

IV. THE RECORD IN THIS CASE DOES NOT PRESENT A DESIRABLE FRAMEWORK WITHIN WHICH TO WEIGH AND RESOLVE THE CONFLICTS SAID TO EXIST BETWEEN OKLAHOMA'S PROHIBITION OF LIQUOR ADVERTISING AND FEDERAL REGULATIONS OF COMMERCIALS ON CABLE TELEVISION.

One final point is worth noting with regard to the conflict which the Petitioners assert exist between Oklahoma's liquor advertising prohibition and 47 C.F.R. § 76.55(b) and 17 U.S.C. § 111(c)(3). Petitioners assert that these regulations forbid cable operators to delete television commercials from broadcast signals or, in

some instances, compel the carriage of out-of-state signals which might include liquor commercials. The Petitioners apparently believe that the presence of these issues renders this case especially appropriate for further review and consideration by this Court. However, when we examine the record in this case in light of these issues, it becomes apparent that just the opposite is true.

The ruling of the District Court which Oklahoma appealed to the Tenth Circuit Court of Appeals consisted of a summary judgment granting permanent injunctions preventing enforcement of the State law. The factual matters pertinent to copyright and communications regulations by the United States were not very thoroughly developed.

Certainly, some of the factual conclusions drawn by the District Court from the very sparse record appear highly suspect. One especially glaring example illustrates this point. In the District Court's Memorandum Opinion and Order which is found at Appendix G to the Petition for a Writ of Certiorari, at page 41a, the District Court made a specific finding of fact that: "12. There exists no feasible way for Plaintiffs to block out the advertisements." What is remarkable about this finding is that it is so inconsistent with factual findings relied upon by the FCC itself following a commercial deletion and substitution experiment conducted in 1971

by the Commission using the facilities of the Bucks County Cable TV System in Falls Township, Pennsylvania. See, Bucks County Cable TV, Inc., 27 F.C.C.2d 178 (1971).

The Bucks County experiment was undertaken because the FCC, in June, 1970, announced a proposal which would have required cable systems carrying the programming of distant commercial television broadcast stations to delete all commercials contained in such programming, substituting in their place commercials obtained from local broadcasters. See, Cable Television Report and Order, 36 F.C.C.2d 138, 154 (1972). Under the experiment, the Bucks County system carried distant signals from New York City broadcast television stations and the commercials of local broadcasters were:

> "inserted into the signals of the New York stations by means of a manual switching system that is dependent on the skill and efficiency of the persons operating the manual switches who are, in turn, dependent on the visual and audio cues in the program material to indicate when the switching deleting the distant advertising and inserting local advertising should be thrown. **Bucks judges that more than 90 percent of the insertions have been made perfectly and that 'a**

> manual switching system of commercial substitutions is feasible.'" Id., 36 F.C.C.2d at 156. (Emphasis added)

It would seem apparent that the deletion of the occasional liquor advertisement, without any required substitution of other advertising, presents a much less rigorous technical problem to cable operators than that involved in the comprehensive substitution experiment undertaken in Bucks County. This, in turn, raises real and substantial questions regarding the accuracy of the District Court's blunt finding that commercial deletion by cable systems is unfeasible.

The purpose of this discussion, of course, is not to challenge the factual findings drawn from the record in this case by the District Court. However, these points do serve to raise the question of whether the record in this case presents a proper framework within which the Supreme Court should properly be inclined to hand down a potentially far-reaching decision pertaining to the complex interplay of federal, state, local and commercial interests implicated by the various regulations of advertising on cable television.

This Court has recognized the existence of the many competing considerations presented by cases involving cable television reguations. Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390, 401, 88

S. Ct. 2084, 2090, 20 L. Ed. 2d 1176 (1968). If the Supreme Court is to weigh, balance and resolve such competing factors, perhaps it should do so only on the basis of a fully developed record presenting factual information of obvious accuracy and completeness. To do so on the basis of the record in this case, however, presents a real and serious danger that the resulting ruling may be ill-informed and, perhaps, even unworkable.

The safer and sounder course, by far, is for this Court to decline to accept jurisdiction in this case. This has the virtue of permitting further and more complete development of the various competing considerations both in the lower Courts and through further regulatory action. This would be consistent with a recognition that regulatory activity in this field remains in a state of constant flux, due both to the emergence of new technologies and the ebb and flow of the competing interests which are constantly maneuvering for regulatory advantage. See, e.g., the Cable Telecommunications Act of 1983, just passed by the United States Senate, s. 66, Congressional Record, June 14, 1983, p. s8325.

If the cable industry's predicament is indeed as dire as the Petitioners suggest, then it seems inevitable that a case will soon present itself to this Court which fully presents an advertising deletion controversy,

perhaps between a cable operator and the FCC or a copyright owner. Then an exercise of jurisdiction by this Court may be much more appropriate than in the case at bar. For now, however, it is the very presence of these cable television advertising regulation issues which, considering the record here, render this case peculiarly unsuitable for the discretionary exercise of jurisdiction sought by the Petitioners.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be denied.

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No. 82-1795

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CAPITAL CITIES CABLE, INC.; COX CABLE OF OKLAHOMA CITY, INC.; MULTIMEDIA CABLEVISION, INC.; AND SAMMONS COMMUNICATIONS, INC.,
Petitioners,

v.

RICHARD A. CRISP, DIRECTOR, OKLAHOMA ALCOHOLIC BEVERAGE CONTROL BOARD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY TO OPPOSITION TO PETITION FOR CERTIORARI

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REPLY TO OPPOSITION TO PETITION FOR CERTIORARI

Respondent appears essentially to contend that the First Amendment issues presented by Oklahoma's ban on alcoholic beverage advertising do not merit review by this Court because (1) a state may prohibit the dissemination of "mere" commercial speech if the prohibition is supported by a substantial state interest; (2) Oklahoma's power to regulate the sale of alcoholic beverages under the Twenty-first Amendment overrides petitioners' interest in the dissemination of commercial speech; and (3) the state has no purpose to inhibit noncommercial speech. Respondent's arguments cannot obscure the importance of the issues presented here or the degree to which the

decision of the court below conflicts with pertinent decisions of this Court.

I.

1. In contending that this case involves only a restriction on commercial speech, and that petitioners "are not prohibited from transmitting all other types of programming into Oklahoma," [1] respondent ignores the Oklahoma restriction's substantial impact on the dissemination of noncommercial speech. As discussed in the petition, the Oklahoma ban on advertising of alcoholic beverages effectively prevents cable television operators from transmitting not only wine advertisements, but also information and entertainment programming that contains such advertisements.[2] The mere fact that a regulation on its face is directed solely at commercial speech does not mean that its broader effect on the dissemination of noncommercial speech may be overlooked. To the contrary, as this Court most recently reaffirmed in *Bolger v. Youngs Drug Products Corp.*, 51 U.S.L.W. 4961, 4963 (U.S. June 24, 1983), every restriction on commercial speech "must be examined carefully to ensure that speech deserving of greater constitutional protection is not inadvertently suppressed."

2. Respondent's only other effort to address this issue appears to be a suggestion that the impact of the Oklahoma ban is limited to commercial speech because cable operators have the technical capacity to delete wine commercials from programming.[3] This argument is specious in light of the undisputed illegality of such deletions under federal law.[4] Even as a technical matter, moreover, respondent has failed to show that the deletions may feasibly be made. Respondent relies entirely on a finding

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[1] Respondent's Brief in Opposition ("Opposition") at 7.

[2] Petition for Certiorari ("Petition") at 18-25.

[3] Opposition at 20-22.

[4] *See* Petition at 5-7, 19-20.

taken out of context from a report by the Federal Communications Commission.[5] While the Commission noted that deletion of commercials had proved to be technically possible in an experimental program, it pointed out that such deletion was "dependent on visual and audio cues in the program material." [6] The Commission decided not to adopt rules requiring deletion of commercial messages, finding such rules infeasible because of the inability of cable operators to secure the "close cooperation" of broadcasters necessary to enable the deletions to be made.[7]

As amply demonstrated in the record in this case, the deletion of wine commercials is similarly impracticable here because petitioners receive from broadcasters and programming services no advance warning or "visual and audio cues" to indicate when wine commercials will be forthcoming.[8] Cable operators testified below that to attempt to delete wine commercials in the absence of advance notice would require prohibitively expensive round-the-clock monitoring and that the deletions could not be completely and instantaneously executed.[9] Based on this showing, to which respondent offered no rebuttal evidence, the district court found that "[t]here exists no feasible way for [petitioners] to block out the advertisements," [10] and the court of appeals did not disturb that finding.

3. The importance of the First Amendment question concerning noncommercial speech is emphasized in the briefs *amici curiae* filed in this case by organizations representing the full spectrum of the communications media

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[5] *Cable Television Report and Order*, 36 F.C.C.2d 143 (1972).

[6] *Id.* at 156.

[7] *Id.* at 165.

[8] *See* Appendix G to the Petition for Certiorari (District Court Opinion on Summary Judgment) at 40a.

[9] *See* Petition at 6.

[10] Appendix G to the Petition for Certiorari at 41a.

—print, broadcast, and cable [11]—and by a memorandum *amicus curiae* submitted by the Federal Communications Commission.[12] Significantly, the Commission's memorandum confirms petitioners' conclusion that pertinent federal law and regulations of the Commission prevent cable operators from deleting commercial messages from programming and thus that the Oklahoma ban effectively suppresses their dissemination of noncommercial speech.[13]

4. The importance of the noncommercial speech issues and the dangerous breadth of the decision below are further demonstrated by respondent's suggestion that under the theory of the present case Oklahoma could lawfully prevent the distribution of out-of-state print publications containing liquor advertising, although it chooses not to do so because of the difficulty of enforcement.[14]

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[11] *See* Brief of Amicus Curiae National Association of Broadcasters at 3-5; Brief of Amici Curiae American Newspaper Publishers Association and Magazine Publishers Association at 2-4, 7-8; Brief Amicus Curiae of National Cable Television Association, Inc., *et al.*, at 13-16. *See also* Brief of Amici Curiae Oklahoma Press Association and Outdoor Advertising Association of Oklahoma.

[12] Memorandum of the Federal Communications Commission as Amicus Curiae at 9-13.

[13] *Id.* at 4-6, 9-13.

[14] Oposition at 2. Respondent apparently attempts to characterize the noncommercial speech issue as a preemption question. Opposition at 11. While the Oklahoma restrictions may indeed present issues regarding federal preemption, particularly insofar as they effectively prevent cable operators from transmitting signals that they are required to transmit under the Federal Communications Commission's "must-carry" rules, the preemption issues have not been ruled on below and are not now before this Court. Moreover, the "must-carry" rules, which most dramatically present the federal preemption question, are only a relatively minor part of petitioners' case. The majority of the signals and programming services offered by petitioners and affected by the Oklahoma ban are not required to be carried under the "must-carry" rules, but are instead selected voluntarily by the cable operators. *See* Petition at 5-7.

Respondent also suggests that this Court should for some reason defer consideration of the First Amendment issues presented here

II.

1. Respondent also seeks to denigrate the importance of the commercial speech issues in the present case. At the same time, respondent appears to concede that Oklahoma's ban on liquor advertisements is precisely the sort of restriction on commercial speech that this Court has emphasized it will not tolerate—a content-based ban on the dissemination of truthful commercial speech about a lawful product, designed to diminish consumption of that product.[15] Respondent readily acknowledges that the purpose of its ban on liquor advertising is to reduce the consumption of alcoholic beverages.[16] Such a paternalistic regulation of commercial speech about a lawfully available, albeit controversial, product has been repeatedly condemned by this Court, which has emphasized that the better and constitutionally mandated approach is "to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them." *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976).[17]

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until a case comes before it involving a conflict between a cable operator and the Federal Communications Commission or between a cable operator and a copyright owner. Opposition at 23-24. Although such cases might arise, they would not directly pose the question of a state's authority to impose sweeping restraints on cable television operators. It is that important question which is clearly presented here and which this Court, petitioners submit, should now consider.

[15] *See* Petition at 11-14. This concern was most recently demonstrated in *Bolger v. Youngs Drug Products Corp.*, 51 U.S.L.W. 4961 (U.S. June 24, 1983), in which the Court invalidated a federal statute that prohibited the mailing of unsolicited advertisements for contraceptives.

[16] Opposition at 13.

[17] Respondent asserts that the liquor advertising ban directly combats traffic accidents and other symptoms of alcohol abuse and

2. Respondent does not deny that the wine advertisements in question concern a lawful activity and does not appear seriously to contend that they are false or deceptive within the meaning of decisions of this Court.[18] Nor does respondent attempt to justify the ban as a limited restriction on the time, place and manner of commercial expression about alcoholic beverages. To the contrary, respondent emphasizes the breadth of the ban, asserting that it permits no off-premises advertising of any kind regarding alcoholic beverages.[19]

3. Respondent asserts primarily that the commercial speech issue presented does not warrant review by this Court because Oklahoma's ban on liquor advertising is an appropriate exercise of state power under the Twenty-

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does so in a way that is not unnecessarily broad. Opposition at 15-19. Even if such a showing could justify a blanket ban on truthful, non-misleading speech, no such showing appears in this record. Respondent has not produced any evidence that the advertisements at issue contribute to alcohol abuse; that their elimination would significantly reduce alcohol abuse; or that there exist no alternative methods to promote temperance that would be less destructive of First Amendment rights. As the district court found, "[t]here is no evidence . . . that Oklahoma's ban on advertising is a direct means of preventing alcohol abuse or protecting the health, safety, or welfare of Oklahomans." Appendix G to Petition for Certiorari at 48a.

[18] Respondent's opposition includes several gratuitous statements to the effect that the wine advertisements seek "the artificial stimulation of consumption of alcoholic beverages by exaggerated displays of the 'good life' . . . ." Opposition at 8. *See also id.* at 9. As the court of appeals properly held in this case, the mere fact that an advertisement demonstrates a controversial product in a favorable light does not mean that it may be suppressed. *Oklahoma Telecasters Association v. Crisp*, 699 F.2d 490, 499 n.7, 500 n.9 (10th Cir. 1983). *See also Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976).

[19] Opposition at 2. In any event, characterization of the ban as a time, place and manner restriction would not "be tenable in light of [its] content-based prohibition." *Bolger v. Youngs Drug Products Corp.*, 51 U.S.L.W. at 4964 n.18.

first Amendment. However, as shown in the petition, this claim directly conflicts with decisions of this Court that have repeatedly stressed that the Twenty-first Amendment does not grant states authority to infringe upon the Bill of Rights and does not change the standard of review under those provisions.[20] The decision principally relied on by respondent, *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), is not to the contrary; indeed, it strongly supports petitioners. The Court in that case unanimously rejected the argument that the Twenty-first Amendment entitles a state to regulate wine prices in a way that conflicts with the federal antitrust laws. The Court emphasized that "important federal interests in liquor matters survived the ratification of the Twenty-first Amendment" and that the Amendment does not "insulate" state regulation from the requirements of equal protection or due process. *Id.* at 108.[21] Review of the present case by this Court is important because the court below has departed so markedly from these principles and, in addition, because of current efforts in other states to enact restrictions on the advertising of lawful alcoholic products.[22]

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[20] Petition at 15-16.

[21] While respondent continues to seek support in this Court's summary dismissal of the appeal in *Queensgate Investment Co. v. Liquor Control Commission*, 103 S. Ct. 31 (1982), respondent fails to rebut petitioners' distinction of that case, *see* Petition at 14-15, or to show why the summary decision there should be dispositive here.

[22] *See* J. Winski, *Pressures Mounting To Curtail Liquor Advertising*, Ad Age, July 18, 1983, at 1. Petitioners note that respondents have misconstrued petitioners' reference to the Fifth Circuit panel opinions in *Lamar Outdoor Advertising, Inc. v. Mississippi State Tax Commission*, 701 F.2d 314, *reh'g en banc ordered*, 701 F.2d 335 (5th Cir. 1983), and *Dunagin v. City of Oxford*, 701 F.2d 335, *reh'g en banc ordered*, 701 F.2d 336 (5th Cir. 1983). *See* Opposition at 5-6. Petitioners did not suggest that these opinions, which found that Mississippi's restrictions on liquor advertising violated the

CONCLUSION

For the reasons stated above and in the petition for certiorari, the writ should be granted.

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First Amendment, created a formal conflict between the Circuits, in light of the orders for rehearing *en banc* entered in both. Rather, petitioners cited the Fifth Circuit opinions because, in taking a position directly contrary to that adopted by the Tenth Circuit in this case, they demonstrate the importance of the issues presented here and provide a cogent and well-reasoned refutation of the Tenth Circuit's decision.

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Petitioners,

v.

RICHARD A. CRISP, DIRECTOR, OKLAHOMA ALCOHOLIC BEVERAGE CONTROL BOARD,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Tenth Circuit

BRIEF OF AMICII CURIAE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION AND MAGAZINE PUBLISHERS ASSOCIATION IN SUPPORT OF PETITION FOR CERTIORARI

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CONSTITUTIONAL PROVISIONS:

Constitution of the United States of America

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BRIEF OF AMICII CURIAE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION AND MAGAZINE PUBLISHERS ASSOCIATION IN SUPPORT OF PETITION FOR CERTIORARI

STATEMENT OF INTEREST

This amicus curiae brief is submitted on behalf of the American Newspaper Publishers Association and Magazine Publishers Association in support of the petition for a writ of certiorari filed by Capital Cities Cable, Inc., Cox Cable of Oklahoma City, Inc., Multimedia Cablevision, Inc., and Sammons Communications, Inc.[1] The American Newspaper Publishers Association ("ANPA") is a national trade association representing approximately 1,400 newspapers which constitute

[1] A copy of the written consents of the parties is being filed with this brief pursuant to Rule 36 of this Court.

over 90 percent of the total daily and Sunday newspaper circulation, and a substantial portion of the weekly newspaper circulation, in the United States. Magazine Publishers Association ("MPA") is a national trade association representing approximately two hundred publishing companies which publish more than eight hundred consumer oriented magazines.

The decision below adversely affects ANPA member newspapers and MPA member magazines throughout the country and most immediately their Oklahoma members. The improper application of this Court's precedents regarding First Amendment protection of commercial speech threatens both newspapers and magazines and their readers. Whatever the merits of regulation of sale and consumption of alcoholic beverages, a ban on communication concerning those subjects is an unconstitutional option both under the decisions of this Court and in the view of the electronic *and print* media most directly affected. Left unreviewed, the decision below may encourage similar unconstitutional regulation by other states which could be applied to the print as well as the electronic media.

SUMMARY OF ARGUMENT

The Court of Appeals for the Tenth Circuit reversed a district court order declaring unconstitutional Oklahoma's ban of liquor ads on cable television. The district court's opinion placed cable television in the same category as out-of-state newspapers and magazines carrying liquor ads, which may be sold at outlets within the state under an opinion of the Oklahoma Attorney General.

The decision below severely distorts the principles developed by this Court to provide First Amendment protection to commercial speech and misapplies the tests stated by this Court. It disregards, too, the critical relationship, highlighted by this case, between commercial and "non-commercial" speech—if the commercial liquor advertisements are banned, the non-commercial programming (news, entertainment, and

otherwise) which they accompany may not be heard by Oklahoma citizens. The rationale of the decision logically would support prohibitions on out-of-state print publications as well as on out-of-state cable signals.

The decision of the Court of Appeals is of grave concern to the print as well as the electronic media and should be reviewed by this Court. If it is allowed to stand, other states may engage in similar regulatory efforts involving alcoholic beverages and other legal products and services. Other courts will be encouraged to similarly misconstrue the careful decisions of this Court over nearly ten years of refining and reinforcing the First Amendment protection of commercial speech.

ARGUMENT

I. The Rationale of the Decision Below Applies to the Print Media.

As a matter of discretionary interpretation, the Oklahoma Attorney General has not sought to prosecute Oklahoma distributors of out-of-state newspapers and magazines that include advertisements for liquor. Yet, the principles and tests applied by the court below equally support a prohibition on liquor advertisements in such newspapers or magazines. The nature of the speech is the same, the nature of the state interest is the same, and the Court of Appeals' misconstruction of the other elements of the *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), test presumably would be the same.

The cable petitioners accurately describe their predicament—the effective prohibition of the non-commercial programming that flows inevitably from a prohibition on liquor advertising and commercial speech. Newspapers and magazines outside Oklahoma fear the opinion below similarly could jeopardize their ability to send the *editorial* portions of their publications into Oklahoma should the prohibition on liquor advertising be applied to them. An administrative ruling of a state attorney general simply is inadequate constitutional protection in light of the Tenth Circuit opinion.

Out-of-state newspapers and magazines could be placed in the same extraordinary quandary in which the Petitioners have

been placed by the decision below. Distributors would be no more able to excise liquor advertisements from, for example, the Kansas City Star,[2] the New York Times or Time magazine than are the Cable Companies able to remove liquor advertisements from the Cable News Network or a must-carry signal from a neighboring state. For the out-of-state publisher, the newspaper or magazine sent by mail or private carrier to homes, businesses, and newstands in Oklahoma is a fully integrated publication—edited so as to present to the reader a useful and complete package of news, opinion and a wide range of other commercial and non-commercial information; to bar that advertising in Oklahoma would have the effect of barring the entire newspaper or magazine.

ANPA and MPA urge this Court to review the decision below to ensure that it will not provide the basis for such a prohibition on the distribution of newspapers and magazines. The serious error in the decision below is highlighted by its easy applicability to similar regulation of the print media.

II. The Decision Below Conflicts with the First Amendment Principles Stated by This and Other Courts.

A. The Court Below Distorts the Principles and Tests Protecting Commercial Speech.

In the past decade this Court has developed substantial protection for the very kind of commercial speech banned by the State of Oklahoma. *Compare Valentine v. Chrestensen*, 316 U.S. 52 (1932) *with Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). As a result, the Court "review[s] with special care regulations [such as this] that entirely suppress commercial speech in order to pursue a nonspeech-related policy." *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. at 556, note 9. Because of this standard of review, "in recent years, this Court has not approved a blanket ban on commercial speech unless the expression itself was flawed in some way, either

[2] For some residents of Oklahoma near the borders of the state, out-of-state newspapers or magazines (which may include liquor advertisements) could be their primary source of both news and commercial information.

because it was deceptive or related to unlawful activity." *Id.*[3] The decision below violates these principles by approving a ban on truthful commercial speech concerning products lawfully sold in the State of Oklahoma.

In *Central Hudson* this Court stated the following four-part test for the protection of commercial speech:

(a) is the speech lawful and not misleading;

(b) is the asserted governmental interest substantial;

(c) does the regulation "directly advance a governmental interest"; and

(d) is the regulation "no more extensive than necessary to serve that interest?"

Id. The Court recently noted the critical importance of the last two elements of this test and further refined them:

> But the state must assert a substantial interest and interference with speech must be in proportion to the interests served. Restrictions must be *narrowly drawn*, and the state may lawfully regulate *only to the extent* regulation furthers the state's substantial interest.

In re R.M.J., 455 U.S. 191, 203 (1982) (emphasis added).[4]

The decision below seriously misconstrues the last two tests under *Central Hudson*. Instead of asking whether the state

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[3] Although the Oklahoma ban allows limited advertising at the retail outlet, it effects a total prohibition on liquor advertising by the petitioner Cable Companies. Appendix to Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit (hereinafter "Appendix to Petition"), App. H, 52a, 53a. It is undisputed that the advertising is truthful and not misleading.

[4] The Court has suggested that an appropriate part of the inquiry under the last two tests of *Central Hudson* is whether "disclaimers or explanation," rather than a prohibition may be the appropriate state remedy. *In re R.M.J.*, 455 U.S. at 203. *See also Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. at 570, 571 (Commission to explore alternatives of additions to advertising, not bans). The decision below ignores such possibilities as supplemental educational messages, educational programs, or stricter enforcement of laws relating to abuse of alcohol and focuses only on prohibitions on distribution of truthful information relating to an activity Oklahoma has chosen to keep lawful. Thus, the amount of information available to the public is diminished, not increased.

interest in preventing the problems of alcohol abuse was *directly* advanced by the ban on advertising, the court below merely held it was "reasonably related" to reducing sales and consumption. Appendix to Petition, App. A, 22a.[5] Instead of searching for other alternatives to a prohibition on expression, the court accepted Oklahoma's choice of the ban as "not unreasonable." *Id.* at 23a, 24a. The decision below thus disregards the direct causal relationship required by this Court's test and substitutes an assumption that a "reasonable relationship exists." It ignores the possibility of more direct means to advance the state's interest—*e.g.*, strict enforcement of statutes relative to operation of motor vehicles while intoxicated or liability for those who sell to or serve intoxicated individuals, advertising of the dangers of excessive consumption or other educational measures to combat the many other causes of the problem—and instead settles on the broadest and least constitutionally acceptable alternative, a total ban on expression.[6] The failure to genuinely explore the causal relationship and the alternatives to a total prohibition on speech highlights the lower court's failure to properly apply the third and fourth parts of the *Central Hudson* test.

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[5] The court below commenced and concluded its inquiry into this branch of the *Central Hudson* test by paying formal service to the language of this Court requiring that the regulation "directly advance" the state interest. The Court of Appeals, however, converted the inquiry into a mere search for a "reasonable relationship" between the state interest and the regulation—there was no evidence that the ban on advertising actually had any effect on alcohol abuse, but the Court of Appeals *presumed* that it must because advertising seeks to increase sales. This sleight of hand showed disregard both for the careful factual findings of the district court and for the mandate of this Court that there be a clear showing that the ban, in fact, *directly* advances the state interest. Such a showing has not been and cannot be made. *Cf. Craig v. Boren*, 429 U.S. 190, 200-203 (1976) (analysis of statistics revealed absence of evidence that traffic safety directly advanced by gender-based classification).

[6] Comparison of the district court opinion with the Court of Appeals' opinion reveals contrasting choices of more versus less information to the public. *Compare* Appendix to Petition, App. G. at 43a (district court opinion) *with* App. A at 21a-24a (court of appeals opinion). The court of appeals' preference for less information, however, violates the premise for this Court's protection of commercial speech. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976).

The Court of Appeals' serious misconstruction of the decisions of this Court is revealed, too, by the conflict between its decision and the careful opinion of the Fifth Circuit Court of Appeals in *Lamar Outdoor Advertising, Inc. v. Mississippi State Tax Commission*, 701 F.2d 314, *reh'g en banc ordered* (5th Cir. March 11, 1983). The Fifth Circuit Court of Appeals properly applied the *Central Hudson* tests and found a similar ban on advertising unconstitutional under the First Amendment.

B. The Court Below Disregards the Critical Relationship Between Commercial and Non-commercial Speech.

This petition for certiorari most dramatically displays the critical relationship between commercial and non-commercial speech in the media. As the district court properly found, many of the programs shown by the Cable Companies simply will not be shown to the citizens of Oklahoma if the ban on liquor advertising is upheld. Appendix to Petition, App. G at 39a.

This case thus involves commercial speech that is not legally or practically separable from the non-commercial expression. *Contra, Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981) (separate billboards used for commercial and non-commercial messages, although regulation struck down because applied to non-commercial billboards); *Friedman v. Rogers*, 440 U.S. 1 (1979) (regulation of tradenames under which optometrists operated); *Queensgate Investment Co. v. Liquor Control Commission*, 433 N.E.2d 138 (Ohio), *appeal dismissed*, 103 S. Ct. 31 (1982) (regulation of liquor permit holder advertising retail price of alcoholic beverages).

Where the commercial and non-commercial speech are inseparable as a practical matter, this Court should apply a far more stringent test for state regulation. *Compare In re Primus*, 436 U.S. 412 (1978) (invalidation of regulation of non-commercial speech) *with Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978) (test for regulation of isolated commercial speech). Although Oklahoma's regulation may have been

aimed only at commercial speech, its undoubted effect is to foreclose non-commercial expression as well.[7] *See Minneapolis Star & Tribune Co. v. Commissioner of Revenue*, 51 U.S.L.W. 4315 (U.S. March 29, 1983) (intent of state not critical if regulation has effect of curtailing speech.)

III. The Decision Below Gives Undue Weight to the State Interest Under the Twenty-first Amendment.

The court below gave far less searching scrutiny to the Oklahoma ban because the state interest was asserted to be grounded in the Twenty-first Amendment to the United States Constitution rather than some other state interest. Though the Court of Appeals notes that the Twenty-first Amendment does not change the scope of review, the balancing process by which it upholds the ban on advertising reveals that it gave undue weight to the Twenty-first Amendment. *Compare* Appendix to Petition, App. A at 17a *with* App. A at 24a.

This heavy reliance on the Twenty-first Amendment is not only improper under the decisions of this Court concerning that Amendment, *Larkin v. Grendel's Den, Inc.*, 51 U.S.L.W. 4025 (U.S. December 13, 1982), *Craig v. Boren*, 429 U.S. 190, 204-208 (1976)[8], but also is a misinterpretation of the appropriate inquiry under *Central Hudson*. *Central Hudson* requires only a determination that the state interest is "substantial"; the weight of that interest should not be balanced against the First

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[7] The relationship between truthful commercial advertising and the non-commercial content of the media is well-recognized. For the Oklahoma publisher of a newspaper or magazine, the prohibition on liquor advertising deprives the newspaper, and its readers, of a portion of the diverse financial base that supports non-commercial news and information gathering as well as the opportunity to be fully informed about legal commercial activities within the state. *See Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. at 770 ("the best means to that end is to open the channels of communication rather than close them").

[8] This case does not involve the kind of "grossly sexual" conduct at issue in *New York State Liquor Authority v. Bellanca*, 452 U.S. 714 (1981) or *California v. LaRue*, 409 U.S. 109 (1972). Nor does it involve the control of conduct in licensed, public establishments in which liquor is actually sold and served, again unlike *Bellanca* and *LaRue*. Rather, the Petition involves clearly protected communication about a lawful subject of commerce by media that are not subject to the liquor licensing authority of the states.

Amendment or affect the inquiry into whether the regulation directly advances that interest or is as narrowly drawn as possible.[9]

If this Court does not review and correct the decision below, other states will be encouraged to embark on similar regulatory schemes under the same mistaken belief that the Twenty-first Amendment provides them with authority to override other constitutional rights.[10]

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[9] The arbitrary balancing process engaged in by the court below should not be encouraged by this Court. If the greater or lesser weight of an interest already found to be "substantial" becomes relevant, the protection provided to commercial speech may become illusory.

[10] The summary dismissal of *Queensgate Investment Co. v. Liquor Control Commission*, 433 N.E.2d 138 (Ohio), *appeal dismissed*, 103 S. Ct. 31 (1982) may have increased the likelihood of such a misinterpretation of the state's power under the Twenty-first Amendment.

CONCLUSION

The decision of the Court of Appeals invites states throughout the country to curtail the flow of commercial information clearly protected by the First Amendment. Regulations such as that upheld below could be used by states to block the flow not only of commercial speech, but of non-commercial expression dependent on and inseparable from commercial speech. Review of the decision below is essential to protect First Amendment rights and to preserve the flow of truthful information to the citizens of Oklahoma and the other states.

DATED June 24, 1983.

Respectfully submitted,

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No. 82-1795

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CAPITAL CITIES CABLE, INC.; COX CABLE OF OKLAHOMA CITY, INC.; MULTIMEDIA CABLEVISION, INC.; AND SAMMONS COMMUNICATIONS, INC.,

Petitioners,

v.

RICHARD A. CRISP, DIRECTOR, OKLAHOMA ALCOHOLIC BEVERAGE CONTROL BOARD,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF BROADCASTERS IN SUPPORT OF PETITION FOR CERTIORARI

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The National Association of Broadcasters ("NAB") hereby respectfully moves for leave to file the attached brief *amicus curiae* in support of the petition for a writ of certiorari in this case. The consent of attorneys for petitioners has been obtained. The consent of the attorney for respondent was requested but refused.

The interest of NAB in this case is set out in detail at pages 1 and 2 of the attached brief. Stated briefly, NAB is an association of radio and television broadcasters whose membership includes stations broadcasting within the State of Oklahoma and also out-of-state broadcasters whose programming is carried by the petitioner cable companies within the

State of Oklahoma. Both are directly affected by the state's ban on advertising of wine and alcoholic beverages upheld by the Tenth Circuit Court of Appeals below. NAB has an interest in preserving the right of these member stations to disseminate, and in the right of their Oklahoma listeners and viewers to receive, the advertising and programming effectively barred by the decision below. NAB also has an interest in the broader First Amendment issues raised by the decision of the court below in upholding Oklahoma's prohibition of an entire class of advertising. Member stations throughout the United States may face similar prohibitions of other classes of advertising and, thereby, interference with the free flow of both advertising and programming if the decision below is permitted to stand.

As the Petition for a Writ of Certiorari sets out in its Statement of the Case, the State of Oklahoma has imposed a ban on the advertising of wine and other alcoholic beverages in the State of Oklahoma. All media originating within the state are required to delete such advertising. As applied to petitioners' cable television systems, the prohibition would also require deletion of such advertising from, *inter alia*, broadcast signals originating outside the state's boundaries.

The Oklahoma Attorney General, representing the respondent Director of the Oklahoma Alcoholic Beverage Control Board *has* consented to the filing of *amicus curiae* briefs on behalf of the print media (American Newspaper Publishers Association and Magazine Publishers Association) and the cable media (National Cable Television Association), each of which is in a position to inform the Court as to the impact of the advertising ban on their respective members' operations. None of these associations, however, represents the interests of the broadcasters whose programming will be deleted from the petitioners' cable systems. Such state-mandated deletion raises serious First Amendment issues concerning noncommercial speech in addition to the commercial speech questions already presented. NAB respectfully submits that the attached brief will provide the Court with a more complete development of

these noncommercial speech issues and will demonstrate additional reasons why the Petition should be granted.

NAB therefore respectfully moves the Court for leave to file the attached brief *amicus curiae*.

Respectfully submitted,

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---

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF BROADCASTERS IN SUPPORT OF PETITION FOR CERTIORARI

INTEREST OF AMICUS CURIAE

The National Association of Broadcasters supports the petition for a writ of certiorari in the above-captioned case.[1]

[1] A copy of the written consent of the petitioners is filed with this brief, as required by Rule 36 of the Court.

The National Association of Broadcasters ("NAB") is a nonprofit association of radio and television stations and broadcasting networks. As of June 15, 1983, NAB membership included 4,437 radio stations, 700 television stations and all the major broadcast networks. Among its members are stations broadcasting within the State of Oklahoma and also out-of-state broadcasters whose programming is carried by the petitioner cable companies. Both are directly affected by the Oklahoma advertising ban and the decision of the Court of Appeals below. NAB has a direct interest in the right of these member stations to disseminate, and in the right of their Oklahoma listeners and viewers to receive, the advertising and programming effectively barred by the decision below.

On a broader scale, NAB has an interest in the serious First Amendment issues raised by Oklahoma's prohibition of an entire class of advertising. If the decision below is permitted to stand, it will encourage other states to seek advancement of local goals through similar prohibitions of speech, ultimately interfering with the free flow of both commercial and noncommercial information.

SUMMARY OF ARGUMENT

The decision of the court of appeals threatens recognized First Amendment interests in several respects. First, the ban on advertising directly prohibits truthful commercial speech concerning lawful products. Second, its application to the petitioner cable companies denies listeners and viewers the right to receive not only the prohibited advertising, but also the broadcast programming integrally tied to that advertising. And, in addition, by upholding the prohibition of an entire class of advertising, the court's decision establishes precedent that may be applied to prohibit other types of advertising, which ultimately could weaken the commercial support of the news and information services of free broadcasting. Under the decisions of this Court, none of these results can be justified by the state interest asserted or by the fact that it arises under the Twenty-first Amendment.

These incursions on First Amendment interests, individually, justify granting the requested writ. But the effective preclusion of *noncommercial* speech sanctioned by the decision below surely should compel this Court to accept review. So long as that decision stands, members of the public can be denied access to news, commentary, entertainment, and commercial information about other goods and services, for no reason other than the fact that one of the program sponsors happens to advertise wine.

ARGUMENT

I. THE DIRECT EFFECT OF OKLAHOMA'S ADVERTISING BAN IS TO RESTRAIN DISTRIBUTION OF NONCOMMERCIAL SPEECH, IN VIOLATION OF THE FIRST AMENDMENT.

A. The Effect, and Not the Intent, of State Regulation on Protected Speech Is Controlling.

The declared intent of the State of Oklahoma is to prohibit only commercial speech, and, ostensibly, only commercial speech within Oklahoma. The ability of the state to impose such a broad prohibition in the face of the First Amendment is, of course, a central issue presented by this case, and one in which NAB's Oklahoma member stations have a direct interest.

However, the effect of the state's action on broadcast programming originating outside the state raises equally compelling First Amendment issues. By imposing the advertising ban on cable television systems, the state prohibits dissemination of not only commercial speech, but also, as a practical matter, the noncommercial speech—news, information, and entertainment—which is broadcast with wine advertising from stations outside the state. While Oklahoma may not intend to suppress distribution of news and ideas, that is the demonstrable result. (*See* Opinion of District Court on Summary Judgment, App. G to Petition at 41a.)

Governmental action which substantially burdens the exercise of First Amendment rights cannot be justified by the mere fact that the intent may be proper or the result unin-

tended. *See Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 51 U.S.L.W. 4315 (U.S. March 29, 1983); *Buckley v. Valeo*, 424 U.S. 1 (1976). Thus, whatever right the State of Oklahoma may have to restrict advertising of alcoholic beverages, it is clear that it may not exercise that right in a manner that substantially restricts other protected speech.

The district court below found, as an uncontroverted fact, that "[t]here exists no feasible way for Plaintiffs to block out the [wine] advertisements" carried as a part of broadcast signals distributed by the petitioner cable companies. App. G to Petition at 41a. The only way for the cable companies to comply with the state law, therefore, would be to eliminate wine-sponsored programming in its entirety from those signals,[2] or even to discontinue carriage of those broadcast signals altogether. Either of these steps would constitute a state-compelled restraint on noncommercial speech impermissible under the First Amendment.

B. Distribution of Information Is Protected by the First Amendment.

The state may argue that enforcement of its ban does not interfere with the programming of out-of-state broadcasters, in that it affects only the distribution of that programming in Oklahoma. Such an argument, however, ignores the fact long recognized by this Court that the right to freely *distribute* information and the concomitant right to receive it are inseparable components of free speech protected by the First Amendment. *See Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976); *Lamont v. Postmaster General*, 381 U.S. 301 (1965); *Lovell v. Griffin*, 303 U.S. 444 (1938). *See also Associated Press v. United States*, 326 U.S. 1, 20 (1945).

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[2] Even assuming such program deletion is possible, it would pose additional problems under 47 C.F.R. § 76.55(b), which requires that broadcast signals be carried in full, "without deletion or alteration of any portion," and under the Copyright Act, 17 U.S.C. § 111(c)(3). *See* Petition at 5.

The First Amendment interest in wide dissemination of broadcast programming within Oklahoma is in no way diminished by the fact that the broadcasters in question may be licensed to communities outside the state. The Communications Act-based scheme of distributing radio and television licenses can hardly be viewed as a restriction on the dissemination of ideas.

The State of Oklahoma presently takes the view that it cannot prohibit its citizens from receiving out-of-state magazines and newspapers. *See* Petition at 4-5. Presumably, it would not seek to prohibit reception of out-of-state broadcast programming. Yet the enforcement of the state's ban on wine advertisements carried with such programming will have that effect, in violation of the First Amendment.

II. OKLAHOMA'S TOTAL PROHIBITION OF ALCOHOLIC BEVERAGE ADVERTISING BANS PROTECTED COMMERCIAL SPEECH IN VIOLATION OF THE FIRST AMENDMENT AND IS INCONSISTENT WITH THE DECISIONS OF THIS COURT.

A. Oklahoma's Advertising Ban Is Inconsistent With First Amendment Protection Recognized in Decisions of this Court.

The Tenth Circuit decision upholding Oklahoma's ban of alcoholic beverage advertising is in direct conflict with decisions of this Court affording First Amendment protection to commercial speech. This Court repeatedly has held that truthful advertising of lawful products is protected by the First Amendment. *See Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981); *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976); *Bigelow v. Virginia*, 421 U.S. 809 (1975). Since the Court first extended First Amendment protection to commercial speech, it has not upheld a blanket ban on the dissemination of truthful, nondeceptive commercial speech concerning lawful activity. *See Central Hudson*, 447 U.S. at 566 n.9; *Bates v.*

State Bar of Arizona, 433 U.S. 350 (1977); *Carey v. Population Services International*, 431 U.S. 678 (1977). *See also* Barrett, *The Uncharted Area—Commercial Speech and the First Amendment*, 13 U.C.D. L. Rev. 2 (1980). As the Court stated in *Metromedia*, 453 U.S. at 505:

> A state may not completely suppress the dissemination of truthful information about an entirely lawful activity merely because it is fearful of that information's effect upon its disseminators and its recipients.

Even a more limited restriction on protected commercial speech than is involved in this case must fall unless it "directly advances the governmental interest asserted" and "is not more extensive than is necessary to serve that interest." *Central Hudson*, 447 U.S. at 566.

The Court made it clear that such a limited restriction "may not be sustained if it provides only ineffective or remote support for the government's purpose . . . ." *Id.* at 564. Here, there was no evidence before the court below linking the advertising of alcoholic beverages to alcohol abuse, nor was there evidence that banning in-state advertising of wine and liquor would "directly advance" the state's interest in reducing alcohol abuse.[3] There was, simply, a leap of logic employed by the court of appeals that cannot be sustained under *Central Hudson*.

The Tenth Circuit similarly ignored the possibility, recognized by the district court (App. A to Petition at 49a), that less restrictive means of advancing the state interest may have been available. Rather, the court of appeals endorsed the state's adoption of the most restrictive means—that is, a prohibition of commercial expression. That sweeping ban of protected speech

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[3] There is, in fact, evidence to support the conclusion that the major function and effect of alcoholic beverage advertising is to promote brand loyalty and increase the market share of the particular advertiser, rather than to increase overall consumption and sales. *See Lamar Outdoor Advertising, Inc. v. Mississippi State Tax Commission*, 701 F.2d 314, 331, *reh'g en banc ordered* (5th Cir. Mar. 11, 1983). There is also evidence, noted by the district court (App. G to Petition at 48(a)) and by the Fifth Circuit in *Lamar*, 701 F.2d at 332, that an intrastate ban on advertising is ineffective in view of the volume of interstate liquor advertising available to the state's residents.

cannot be squared with the First Amendment or with decisions of this Court.

B. The Protection Afforded Commercial Speech by this Court Is Not Diminished in a Twenty-first Amendment Context.

The states' authority to regulate the sale and consumption of alcoholic beverages under the Twenty-first Amendment cannot be construed to reduce the protection afforded commercial speech by this Court. While that authority has been extended beyond the literal meaning of "transportation or importation" of alcoholic beverages,[4] the Court, in recent years, has narrowed the scope of permissible state regulation under the Twenty-first Amendment. *See, e.g., California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975). In *Craig v. Boren*, 429 U.S. 190, 206 (1976), the Court stated:

> Once passing beyond consideration of the Commerce Clause, the relevance of the Twenty-first Amendment to other constitutional issues becomes increasingly doubtful. As one commentator has remarked, "Neither the text nor the history of the Twenty-first Amendment suggests that it qualifies individual rights protected by the Bill of Rights and the Fourteenth Amendment where the sale or use of liquor is concerned."

And, as the Tenth Circuit court conceded, "[t]he Twenty-first Amendment did not grant to the states the authority to abrogate individual rights guaranteed by the Fourteenth Amendment." App. A to Petition at 17a.

This Court has required that Twenty-first Amendment incursions upon other constitutional interests be considered "in the context of the issues and interests at stake in any concrete case," *Hostetter v. Idlewild Liquor Corp.*, 377 U.S. 324, 332 (1964). In the area of commercial speech, the Court provided

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[4] *See, e.g., Joseph D. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966); *Joseph Finch & Co. v. McKittrick*, 305 U.S. 395 (1939); and *State Board of Health v. Young's Market*, 299 U.S. 59 (1939).

in *Central Hudson* the mechanism for assessing these "issues and interests." The power of states to wield Twenty-first Amendment authority simply has not been expanded to include the power to prohibit protected commercial speech by the media. Whatever the power of the state may be to advance its interest in reducing sales, consumption, and abuse of alcoholic beverages—under the Twenty-first Amendment or otherwise—the manner in which that power is exercised must still pass constitutional muster. *Central Hudson* makes it clear that state authority must be exercised in a fashion that does not compromise the First Amendment protection extended to commercial speech under the decisions of this Court.

III. THE COURT'S REASONING BELOW CREATES PRECEDENT FOR RESTRICTING OTHER CLASSES OF ADVERTISING.

The state's restriction on alcoholic beverage advertising presents important issues concerning both commercial and noncommercial speech that warrant review by this Court. Moreover, the impact of that restriction may not be limited to liquor advertising.[5]

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[5] The court of appeals' initial discussion of *Queensgate Investment Co. v. Liquor Control Commission*, 433 N.E.2d 138 (Ohio), *appeal dismissed*, 103 S. Ct. 31 (1982) might suggest such limited interpretation. *See* App. A to Petition at 7a-9a, 13a-17a. However, that court also notes at one point that "[t]he Twenty-first Amendment did not grant to the states the authority to abrogate individual rights guaranteed by the Fourteenth Amendment," (App. A to Petition at 17a), and proceeds to work through the *Central Hudson* test with only indirect reliance on the Twenty-first Amendment. The result is a rationalization of advertising prohibitions that could be applied in any case where a court believed "additional deference" was due the decisions of a legislative or regulatory body.

Even if the Tenth Circuit opinion is viewed strictly as a "Twenty-first Amendment case," the decision goes far beyond the bounds of acceptable regulation recognized by other courts in applying that amendment. *See, e.g., New York State Liquor Authority v. Bellanca*, 452 U.S. 714 (1981), *cert. denied*, 102 S. Ct. 2296 (1982) (ban on nude dancing in liquor licensed establishments); *Craig v. Boren*, 429 U.S. 190 (1976) (prohibition of *sale* of liquor on gender-based age classification); *California v. LaRue*, 409 U.S. 109 (1972) (ban of sexual activity in liquor licensed establishments); *Queensgate Investment Co. v. Liquor Control Commission, supra* (restrictions on price advertising by liquor license holders). In none of these cases is there any support for a total ban on advertising or a prohibition directed at the media which carries such advertising.

The court of appeals opinion does speak of "the additional deference owed to the legislature as a result of the Twenty-first Amendment" and weighs that deference heavily in the balance against First Amendment interests (*see* App. A to Petition at 22a-24a). But the danger in the decision below is the ease with which a total ban on other classes of advertising could be justified by the assertion of *any* substantial state interest. Under the court of appeals' misapplication of *Central Hudson* and *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), all that is required is a "reasonable relationship" between a prohibition against advertising and the presumed reduction of the sale of products that contribute to the perceived problems. The language of the court below itself suggests the extreme reach of such reasoning:

> The entire economy of the industries that bring these challenges is based on the belief that advertising increases sales. We therefore do not believe that it is constitutionally unreasonable for the State of Oklahoma to believe that advertising will not only increase sales of particular brands of alcoholic beverages but also of alcoholic beverages generally.[6]

App. A to Petition at 22a. From this it would follow that there always will be a "reasonable relationship" between advertising sought to be banned and any social interests related to use of the products or services advertised. Such a construct does not depend on the presence of a Twenty-first Amendment interest and, if followed by other states and other courts, it could encourage the prohibition of advertising of any number of products and services.

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[6] In a strikingly similar case, the Court of Appeals for the Fifth Circuit in *Lamar Outdoor Advertising*, 701 F.2d at 331, was *not* willing to accept the validity of such a "reasonable belief" as a basis for prohibiting alcoholic beverage advertising. There, the court found *conflicting* evidence on the question of whether advertising promoted overall consumption of alcoholic beverages or only affected brand loyalty and market share of the advertiser. The court agreed with the district court finding in the present case (*see* App. G to Petition at 48a) that "the ban on advertising is at best an indirect means of advancing the State's interest" and not sufficient to justify infringement of the First Amendment rights involved. *Id.* at 331-33.

The prospect of wide-ranging advertising prohibitions is of obvious concern to NAB's members. It is an economic fact of life that advertising revenues have a direct effect on the ability of broadcasters to maintain news organizations and to offer quality programming, just as the "news hole" of a newspaper depends on the amount of advertising sold. This close interdependence of commercial and noncommercial speech in the mass media provides yet another reason for examining with increased care the type of blanket prohibition of advertising upheld by the Tenth Circuit in this case. As the Court noted in *Bigelow v. Virginia*, 421 U.S. 809, 828 (1975), such a ban imposed on the media "incur[s] more serious First Amendment overtones" than would restrictions applied only to the advertiser. *See also Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, 382-83 (1973).

The decision of the Tenth Circuit, if allowed to stand, may be seen by some—other states, regulatory bodies, special interest groups—as precedent for prohibiting advertising of other products and services in response to any number of perceived social problems. Given the cumulative effect of even a few such prohibitions on the media, the danger of such a precedent cannot be ignored. The Court is urged to review the decision below before it has this effect.

CONCLUSION

The decision of the court of appeals, if allowed to stand, creates a dangerous precedent for curtailing commercial speech without adequate analysis of either the alternatives to, or the effects of, such a prohibition. And, of equal importance, it ignores the impact of such a prohibition on the dissemination of broadcast programming integrally connected to the advertising in question. In both instances, the implications of the decision reach beyond alcoholic beverage advertising and threaten the free flow of information in both commercial and noncommercial contexts. Review by this Court is required to protect these vital First Amendment interests.

Respectfully submitted,

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No. 82-1795

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CAPITAL CITIES CABLE, INC.; COX CABLE OF OKLAHOMA CITY, INC.; MULTIMEDIA CABLEVISION, INC.; AND SAMMONS COMMUNICATIONS, INC.,

v. *Petitioners,*

RICHARD A. CRISP, DIRECTOR, OKLAHOMA ALCOHOLIC BEVERAGE CONTROL BOARD,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF AMICUS CURIAE OF NATIONAL CABLE TELEVISION ASSOCIATION, INC., AMERICAN TELEVISION AND COMMUNICATIONS CORP., TURNER BROADCASTING SYSTEM, INC., AND VIACOM INTERNATIONAL, INC. IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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The National Cable Television Association, Inc. ("NCTA"), American Television and Communications Corp. ("ATC"), Turner Broadcasting System, Inc. ("TBS"), and Viacom International, Inc. ("Viacom"), respectfully submit this brief *amicus curiae* in support of the Petition for a Writ of Certiorari.

INTEREST OF AMICI CURIAE

NCTA is the principal trade association representing cable television operators in the United States. NCTA's members operate more than 2,000 cable systems nationwide. ATC, a wholly-owned subsidiary of Time, Inc., owns and operates 124 cable television stations in 33 states. TBS is the owner of SuperStation, Inc., which is the licensee of television station WTBS, Atlanta, Georgia. TBS also owns and operates the Cable News Network, an advertiser-supported all-news network. Both the Cable News Network and WTBS are delivered by satellite to cable systems nationwide for retransmission to cable subscribers. Both services currently carry wine commercials. Viacom is a diversified communications and entertainment company. Among other activities, Viacom owns 42 cable television systems in the United States, and operates an advertiser-supported satellite cable network.

Cable operators and advertiser-supported program services have a direct and substantial interest in this case. The court below has held that Oklahoma may prohibit cable operators from transmitting commercials for alcoholic beverages (including wine) on any of its channels. The result of such a prohibition is to limit drastically the sources of news and entertainment programming available to Oklahoma cable operators for retransmission to subscribers on their multichannel cable systems.

Microwave and satellite technology now makes it possible for cable systems to offer their subscribers not only improved reception of local over-the-air broadcast signals, but also distant, out-of-state broadcast signals and national cable networks. Many of these program sources contain advertising, including wine commercials. Because it is practically impossible for a cable operator to delete specific commercials from the numerous program services carried by his system (and because deletion of commercials from distant broadcast signals would be unlawful

and would result in copyright liability), the effect of the Oklahoma statute is to prevent Oklahoma cable systems from transmitting any distant broadcast signals and cable networks that may include wine commercials.

The law thus severely restricts the cable operator's discretion in selecting programming and prevents subscribers from receiving any of the wide range of advertiser-supported program services that emanate from outside Oklahoma and would otherwise be available. The impact on advertiser-supported cable services is also severe. In seeking to survive in competition with national broadcast networks and other programming sources, these cable services generally depend upon a national audience of the largest possible size. If a state can effectively prevent a cable program service from reaching its residents, the result is not only to deny the service to cable operators and subscribers within that state but also to threaten the viability of the service nationwide.

For these reasons, NCTA, ATC, TBS, and Viacom submit this brief *amicus curiae* and urge the Court to grant the petition for a writ of certiorari.

ARGUMENT

Introduction

This case presents novel and important First Amendment questions concerning the extent to which a state may prohibit communications media from carrying advertisements for certain products. At issue is an Oklahoma statute that prohibits the advertising of alcoholic beverages within the state.[1] The prohibition does not apply to national and out-of-state newspapers and magazines that are distributed in Oklahoma, and, until recently, the law was not enforced against television programming that originated outside Oklahoma but was retransmitted by Oklahoma cable systems. In May 1980,

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[1] Oklahoma Alcoholic Beverage Control Act, 37 Okla. St. Ann. § 516 (1982). *See also* Okla. Const. art. 27, § 5.

however, the Oklahoma Attorney General reversed past policy and ruled that the statute prohibits cable systems in Oklahoma from carrying advertisements for alcoholic beverages on any of the signals that they transmit to their subscribers.

The signals transmitted by cable systems are obtained from several sources. One source is local and nearby broadcast signals, which are received over-the-air, using a tall master antenna. In its earliest days, cable television's principal function was to provide clear reception of nearby signals in rural areas where over-the-air reception was poor.

Cable systems can also obtain and retransmit more distant broadcast signals, which are obtained off the air in a distant market and relayed to the cable system by microwave or by satellite transmission. In addition, cable operators can now choose from among a large number of non-broadcast program services that are transmitted by several communications satellites. As the Federal Communications Commission has noted, "As a result of satellite technology, cable systems and their subscribers have access to an extremely rich and divergent mix of program and information services." [2] From among all these

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[2] *Amendment of Part 76, Subpart G of the Commission's Rules and Regulations Concerning the Fairness Doctrine and Political Cablecasting Requirements for Cable Television Systems* (MM Docket No. 83-130), Notice of Proposed Rulemaking, FCC 83-331, para. 25 (May 25, 1983).

> For example, there are already 24-hour news services, ethnic, youth, and adult-oriented program channels. There are in operation or under development religious program channels, political affairs channel, all weather, all sports, health channels, channels of foreign language programming, of cultural programming, women's programming, and regionally oriented satellite networks. In addition, many new program or information services are in the developmental stage and will be added to the existing list of cable satellite networks that now provide diversified informaiton and programming to the public.

Id.

available program sources and his own locally produced programming,[3] the cable operator selects those that in his judgment will best meet the needs and demands of his community.

While some cable services, such as premium movie channels, are supported completely by fees charged to the cable system and its subscribers, many of the available program sources contain commercial advertising.[4] Except for television stations actually located in Oklahoma, these broadcast and satellite-delivered non-broadcast sources may and often do contain wine advertisements. Under the Oklahoma Attorney General's interpretation, cable operators in Oklahoma may not carry any of these program sources on their systems unless they delete all such advertisements.

As the district court determined, deletion of wine commercials from satellite-distributed non-broadcast cable services would, in most circumstances, be impossible.[5] Unless the program service gave the cable operator advance notice of the precise timing of each wine commercial, the cable operator would have no conceivable way of deleting it. But even if program services were able and willing to provide the information, the cost of actually deleting signals would be prohibitive.

With respect to distant, out-of-state broadcast signals that carry wine advertisements, the problem is not merely one of expense or impracticability. Under existing Federal laws and regulations, cable operators are not permit-

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[3] This may include access channels that are made available to the public and to governmental and educational institutions. It may also include channels operated by the cable operator that provide local news and entertainment programming.

[4] Currently, there are 42 operating satellite-delivered program services, of which 17 are advertiser-supported.

[5] "There exists no feasible way for Plaintiffs to black out the advertisements." Appendix to Petition ("Pet. App.") at 41a.

ted to delete commercials on a broadcast signal. The Federal Communications Commission flatly prohibits such deletions. *See* 47 C.F.R. § 76.55(b) (1982). In addition, under the Copyright Act of 1976, a cable operator who deletes a broadcaster's commercials forfeits his statutory license to carry broadcast signals and is liable for copyright infringement. *See* 17 U.S.C. § 111(c)(3) (Supp. V 1981).

Thus, by prohibiting cable operators from retransmitting wine commercials, Oklahoma has also prohibited cable systems from retransmitting any out-of-state commercial broadcast stations that carry such commercials.[6] And, because of the practical infeasibility of deleting commercials, Oklahoma has also effectively prohibited cable operators from carrying any of the multitude of advertiser-supported satellite-delivered cable program services that may carry wine advertisements.

If this prohibition is upheld, the effect on cable operators and their subscribers will be devastating. Cable television is a highly capital-intensive business. A cable operator's decision to wire an entire community and equip his facilities is premised on his ability to provide a multichannel package of program services that best meets the demands of his community. If the cable operator is not permitted to include distant broadcast signals or advertiser-supported satellite services in his package, the value of his service will be diminished, "probably caus[ing] a large but inherently immeasurable reduction in . . . subscriber revenue."[7] This loss in revenue could threaten

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[6] The statute creates an additional problem for Oklahoma cable systems near the state's borders. Under FCC rules, cable operators are required to carry broadcast signals from local or nearby communities. *See* 47 C.F.R. §§ 76.57-76.61 (1982). Some Oklahoma cable operators are required by this rule to carry out-of-state signals from across the border. These signals may carry wine commercials. In these cases, the Oklahoma statute puts the cable operator in unavoidable jeopardy. If he carries the out-of-state signal with com-

[7] Pet. App. at 42a.

the viability of the cable system or substantially reduce the number of viewing options available to subscribers.

The court of appeals analyzed the Oklahoma advertising prohibition as if it affected only "commercial speech," and held that, under this Court's decisions, a ban on the advertising of alcoholic beverages was permissible. Even if this were simply a "commercial speech" case, the court's conclusion would have been erroneous. This Court has never held that the First Amendment permits a state to prohibit the truthful advertising of a lawful product. Oklahoma's statute, however, restrains not only commercial but also non-commercial speech, insofar as it effectively prevents cable operators from retransmitting and Oklahoma residents from receiving any out-of-state broadcast signals and any advertiser-supported satellite-delivered cable networks and services. This Court should review the court of appeals' decision, because such a broad restriction on the cable operator's program selection and on the public's viewing options goes far beyond what the First Amendment permits.

I. The Complete Prohibition of Liquor Advertising Is an Impermissible Restraint on Commercial Speech.

Viewed simply as a restraint on commercial speech, the Oklahoma advertising prohibition raises serious First Amendment problems and is at odds with well-established precedents of this Court. Even speech that does no more than "simply propose a commercial transaction" is entitled to First Amendment protection.[8] The state's asserted purpose in prohibiting liquor advertising—"to re-

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mercials intact, he violates the Oklahoma statute. If he deletes the wine commercials, he violates FCC and copyright rules prohibiting such deletions. And if he does not carry the signal at all, he violates the FCC's rule requiring such carriage.

[8] *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 760 (1976), quoting *Bigelow v. Virginia*, 421 U.S. 809, 822 (1975).

duce the sale and consumption of liquor, and thereby reduce the problems associated with alcohol abuse" [9]—does not justify the resulting restraint on speech.

Oklahoma does not prohibit the sale of alcoholic beverages. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 773 (1976), this Court squarely addressed the question "whether a State may completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients" and decided that the "answer . . . is in the negative." As the Court found,

> It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.

Id. at 770.

In *Carey v. Population Services International*, 431 U.S. 678 (1977), the Court similarly held that a state could not prohibit truthful advertising of legally available contraceptives in order to discourage their use and discourage illicit sexual activity. The Court suggested that the strict standards of *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (*per curiam*), apply to efforts by the state to suppress completely the truthful advertising of a lawful product. That is, only advertising that is "directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action" may be prohibited. 431 U.S. at 701, quoting *Brandenburg, supra.*

The court of appeals, however, concluded that, under the standards for reviewing restraints on commercial speech that this Court enunciated in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), Oklahoma's total ban on

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[9] Pet. App. at 20a.

liquor advertising was permissible. In *Central Hudson*, the Court noted that

> [i]n commercial speech cases, . . . a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

447 U.S. at 566. The court of appeals held that, while the statute prohibited advertising that concerned lawful activity and was not misleading, the prohibition directly advanced the state's substantial interest in reducing alcohol consumption and was no more extensive than necessary to serve that interest.

This Court purported, in *Central Hudson*, not to overrule its previous decisions on commercial speech but simply to synthesize those holdings.[10] Indeed, the Court reaffirmed in *Central Hudson* that "in recent years this Court has not approved a blanket ban on commercial speech unless the expression itself was flawed in some way, either because it was deceptive or related to unlawful activity." 447 U.S. at 566 n.9. Thus, as the Court

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[10] As the Court subsequently stated with respect to the *Central Hudson* standards,

> We recognize, of course, that the generalizations summarized above do not afford precise guidance to the Bar and the courts. *They do represent the general principles that may be distilled from our decisions in this developing area of the law.* As they are applied on a case by case basis . . . more specific guidance will be available.

In the Matter of R.M.J., 102 S. Ct. 929, 938 n.16 (1982) (emphasis added).

subsequently made clear, nothing in *Central Hudson* altered the fundamental holding that "[a] State may not completely suppress the dissemination of truthful information about an entirely lawful activity merely because it is fearful of that information's effect upon its disseminators and recipients." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 505 (1981).

By ignoring the precedents of this Court on which the *Central Hudson* standards are based, the court of appeals misapplied those standards. If a state could completely ban the advertising of a lawful product whenever it had a "substantial interest" in discouraging use of that product, the protections afforded to commercial speech by the First Amendment would be vitiated. The Court's statement in *Central Hudson* that a regulation of commercial speech "may not be sustained if it provides only ineffective or remote support for the government's purpose . . . [or] if the governmental interest could be served as well by a more limited restriction on commercial speech," 447 U.S. at 564, must be read in light of its previous decisions (and its decision in *Central Hudson* itself) striking down advertising bans aimed at discouraging consumption of lawful products.

If the state has an interest in suppressing the sale of a product, it may ban the product itself or it may publicize the product's defects and attempt to persuade the public not to buy it. Or it may, in some circumstances, regulate the "time, place and manner" in which the product is advertised.[11] But it may not shut off the flow of information about the product in the hope that, as a result, consumption will decline. Under the *Central Hudson* test, such an approach is too indirect a method to advance the

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[11] *See, e.g., Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., supra*, 425 U.S. at 771; *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 93 (1977); *Carey v. Population Services International, supra*, 431 U.S. at 700.

state's public policy goals [12] and is too broad a restraint on speech.

This outcome is unaffected by the fact that, in the present case, the advertising at issue concerns alcoholic beverages. The Twenty-first Amendment does not supersede the First Amendment and give states the power to ban truthful advertising of a lawful product. In holding to the contrary, the court of appeals erroneously relied on this Court's dismissal of the appeal in *Queensgate Investment Co. v. Liquor Control Commission*, 103 S. Ct. 31 (1982), "for want of a substantial federal question."

The regulations upheld in that case "prohibited off-premises price advertising by *holders of certain liquor permits*." [13] They did not completely prohibit all advertising of alcoholic beverages in order to suppress their sales and consumption, and they applied only to advertising by licensed retailers and not to advertising by producers of alcoholic beverages. Nevertheless, the court of appeals was inexplicably "confident that the constitutional question presented in *Queensgate* and in the present appeals is substantially the same," Pet. App. at 14a, and concluded that

> [w]hen the Twenty-first Amendment is considered in addition to Oklahoma's substantial interest under its police power, the balance shifts in the state's favor, permitting regulation of commercial speech that might not otherwise be permissible. We believe that the Supreme Court's summary dismissal in *Queensgate* mandates this result.

Id. at 24a.

This Court has, however, made clear that the Twenty-first Amendment, while permitting states to regulate the

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[12] *See Central Hudson, supra*, 447 U.S. at 566 n.9: "We review with special care regulations that entirely suppress commercial speech in order to pursue a nonspeech-related policy. In those circumstances, a ban on speech could screen from public view the underlying governmental policy."

[13] Pet. App. at 7a (emphasis added).

sale of alcoholic beverages, does not permit regulation that would otherwise violate the First Amendment or other Constitutional protections of individual rights.[14] The only relevance of the Twenty-first Amendment to the First Amendment analysis in this case is that the Twenty-first Amendment confirms that Oklahoma may have a legitimate and "substantial" interest in regulating the sale and consumption of alcoholic beverages. But, as shown above, Oklahoma's advertising prohibition fails the *Central Hudson* test not because there is no substantial state interest but because, as this Court has consistently held, a total advertising prohibition is an overly broad and impermissible means of furthering that interest, even if it is substantial. The Twenty-first Amendment empowers states to prohibit the sale of alcoholic beverages and, in some cases, to limit the time, place and manner in which such beverages are sold.[15] But the First Amendment commitment to the free exchange of ideas and information about lawful activities and products prevents states from completely suppressing the truthful advertising of such beverages if their sale is lawful.

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[14] *See, e.g., California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106-10 (1980); *Craig v. Boren*, 429 U.S. 190, 209 (1976); *Wisconsin v. Constantineau*, 400 U.S. 433, 436 (1971).

[15] *See, e.g., New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 715 (1981) (*per curiam*). In that case, the Court held that "[t]he State's power to ban the sale of alcoholic beverages entirely includes the lesser power to ban the sale of liquor on premises where topless dancing occurs." *Id.* at 717.

Similarly, in *California v. LaRue*, 409 U.S. 109 (1972), the Court upheld a prohibition on acts of "gross sexuality" in establishments where liquor is served. In both cases, "the statute's prohibition applie[d] only to establishments which [were] licensed by the State to serve liquor." *Bellanca, supra*, 452 U.S. at 716. Thus, those cases suggest at most that a state may impose conditions on the circumstances under which a licensee may sell alcoholic beverages. They provide no support for the proposition that a state may control or suppress off-premises advertising or other speech, particularly when the speaker is not a state licensee.

II. The Advertising Prohibition Impermissibly Suppresses Noncommercial Speech By Preventing Cable Operators From Carrying National and Out-of-State Program Services.

The Oklahoma liquor advertising prohibition's restraining effect on commercial speech is itself sufficient to warrant review of the court of appeals' decision. But the restraints of the statute on noncommercial programming carried by cable systems are even more serious and go directly to the heart of the First Amendment.

As the Federal Communications Commission has noted, "Millions of households may be afforded not only increased viewing options, but also access to a diversity of services from cable television that presently is unavailable in their communities." [16] The Oklahoma statute drastically limits the viewing options and diversity of services that cable can provide. By effectively preventing cable operators from carrying out-of-state broadcast signals and satellite-delivered advertiser-supported program services that carry wine commercials, the statute unlawfully intrudes on cable operators' discretion in selecting programming and limits the flow of information available to Oklahoma residents.

Any governmental action that restricts available program sources and limits a media operator's editorial discretion in compiling and distributing a package of information to the public infringes basic First Amendment interests. In *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) and *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973),

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[16] *Cable Television Syndicated Program Exclusivity Rules* (Docket No. 20988), Report and Order, 79 F.C.C.2d 663, 746 (1980), *aff'd, Malrite T.V. of New York v. FCC*, 652 F.2d 1140 (2d Cir. 1981), *cert. denied*, 102 S. Ct. 1002 (1982).

this Court made clear that the First Amendment protects the editorial discretion of newspapers and broadcasters, respectively. Like newspapers, cable operators offer their subscribers a package of diverse entertainment and information, some of which they originate and some of which they obtain from other sources. And, as this Court found in *FCC v. Midwest Video Corporation*, 440 U.S. 689, 707 (1979), "Cable operators now share with broadcasters a significant amount of editorial discretion regarding what their programing will include."

While the Court has not had occasion to address specifically the First Amendment status of cable television, there can be no doubt that the programming transmitted by cable systems and the cable operators' editorial discretion in selecting that programming are similarly protected from governmental intrusion. Lower courts that have considered the issue have confirmed that cable operators are media of expression protected by the First Amendment.[17]

The Oklahoma liquor advertising ban, as construed by the state Attorney General, prevents cable operators from

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[17] *See, e.g., Home Box Office, Inc. v. FCC*, 567 F.2d 9, 43-51 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977); *Community Communications Co., Inc. v. City of Boulder*, 660 F.2d 1370, 1376 (10th Cir. 1981); *Midwest Video Corp. v. FCC*, 571 F.2d 1025, 1053-57 (8th Cir. 1978), *aff'd on other grounds*, 440 U.S. 689 (1979); *Community Television of Utah, Inc. v. Roy City*, 555 F. Supp. 1164 (D. Utah 1982); *Home Box Office, Inc. v. Wilkinson*, 531 F. Supp. 987 (D. Utah 1982).

Some courts have questioned the extent to which the First Amendment protects cable operators from regulations that do not directly affect program content and editorial discretion. *See, e.g., Omega Satellite Products v. City of Indianapolis*, 694 F.2d 119, 127-28 (7th Cir. 1982); *Community Communications Co., Inc. v. City of Boulder, supra*, 660 F.2d at 1377-79. However, no such questions apply where, as here, content control is at issue.

selecting and Oklahoma viewers from receiving out-of-state broadcast signals and national news, information and entertainment services merely because those services may occasionally include wine commercials. Even if the commercials themselves were entitled to no First Amendment protection, this broad restraint on the national "free trade in ideas" [18] would be constitutionally impermissible. Short of a national emergency or a clear and present danger, no regulatory interest permits a state to surround itself with an "iron curtain" that prevents out-of-state information and communications from reaching its citizens.

It was just this sort of restraint on national and interstate communications media that worried this Court when it struck down Virginia's ban on abortion advertisements in *Bigelow v. Virginia*, *supra*, 421 U.S. at 828-29:

> If application of this statute were upheld under these circumstances, Virginia might exert the power sought here over a wide variety of national publications or interstate newspapers carrying advertisements similar to the one that appeared in Bigelow's newspaper or containing articles on the general subject matter to which the advertisement referred. Other States might do the same. The burdens thereby imposed on publications would impair, perhaps severely, their proper functioning. *See Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 257-58 (1974).

Although Virginia's prohibition was never applied to national or interstate newspapers or publications distributed in the state, the Court left little doubt that any such application—which could effectively preclude distribution of these newspapers and publications in Virginia—would run afoul of the First Amendment because

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[18] *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

> [t]he policy of the First Amendment favors dissemination of information and opinion, and "[t]he guarantees of freedom of speech and press were not designed to prevent 'the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential . . . .' 2 Cooley, Constitutional Limitations 886 (8th Ed.).

421 U.S. at 829, quoting *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 150 (1967) (opinion of Harlan, J.). Oklahoma has similarly refrained from applying its prohibition on liquor advertising to newspapers and other publications printed outside the state. But by applying the law to commercials carried by Oklahoma cable systems on the national or out-of-state program services that they retransmit, the state restrains the flow of information just as surely as if it were to forbid distribution of the New York Times, the Wall Street Journal, Time and Newsweek because they contained liquor advertisements.

Any restraint on truthful advertising of a lawful product creates First Amendment problems. However, a law that prevents state residents from receiving the Cable News Network or other national program services and out-of-state broadcast signals because such services happen to carry wine commercials from time to time goes beyond the mere regulation of commercial speech. By treating the Oklahoma prohibition as if it restrained only commercial speech,[19] the court of appeals ignored the severe First Amendment restraint on non-commercial speech at issue in this case.

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[19] Pet. App. 14a.

CONCLUSION

For the foregoing reasons, the Court should grant the petition of Capital Cities Cable, Inc., Cox Cable of Oklahoma City, Inc., Multimedia Cablevision, Inc. and Sammons Communications, Inc. for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

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No. 82-1795

In the Supreme Court of the United States

OCTOBER TERM, 1982

CAPITOL CITIES CABLE, INC.; COX CABLE OF OKLAHOMA CITY, INC.; MULTIMEDIA CABLEVISION, INC., and SAMMONS COMMUNICATIONS, INC.,
Petitioners,

v.

RICHARD A. CRISP, DIRECTOR, OKLAHOMA ALCOHOLIC BEVERAGE CONTROL BOARD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for The Tenth Circuit

BRIEF OF AMICI CURIAE OKLAHOMA PRESS ASSOCIATION AND OUTDOOR ADVERTISING ASSOCIATION OF OKLAHOMA IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF INTEREST OF AMICI CURIAE

The Oklahoma Press Association is an Oklahoma corporation whose membership includes 256 Oklahoma newspapers engaged in the business of newspaper publishing throughout Oklahoma. The Outdoor Advertising Association of Oklahoma is an Oklahoma corporation whose membership includes 20 outdoor advertising enterprises engaged

in the business of placing outdoor advertising throughout the State of Oklahoma. The Oklahoma Press Association and the Outdoor Advertising Association of Oklahoma, on behalf of themselves and their members, have joined as plaintiffs in a suit against Richard A. Crisp, the Director of the Oklahoma Alcoholic Beverage Control Board, the respondent in this matter.

This suit of the Oklahoma Press Association and of the Outdoor Advertising Association of Oklahoma seeks a declaration that enforcement of article 27, section 5 of the Oklahoma Constitution and of 37 Okla. Stat. § 516 (1981) by Richard A. Crisp would injure or destroy rights inuring to the Oklahoma Press Association and the Outdoor Advertising Association of Oklahoma and to their members under the First and Fourteenth Amendments to the United States Constitution to publish advertisements of alcoholic beverages. The Oklahoma Press Association and the Outdoor Advertising Association of Oklahoma also seek an injunction to prevent Richard A. Crisp from enforcing these provisions of the Oklahoma Statutes and Oklahoma Constitution.

On February 10, 1982, the Honorable Lee R. West preliminarily enjoined Richard A. Crisp from enforcement of Oklahoma's constitutional and statutory provisions prohibiting the advertisement of alcoholic beverages against the Oklahoma Press Association and the Outdoor Advertising Association of Oklahoma and their members. The primary reasons stated by the court for its order of the preliminary injunction were (1) that the Oklahoma Press Association and the Outdoor Advertising Association of Oklahoma and their members were still subject to Oklahoma's prohibitions against the advertisement of alcoholic beverages and

(2) that the Oklahoma Press Association and the Outdoor Advertising Association of Oklahoma and their members were in a similar situation regarding the exercise of their First and Fourteenth Amendment rights as had been the plaintiffs in the cases of *Oklahoma Teecasters Ass'n* v. *Crisp*, CIV-81-439-W (W.D. Okla., December 18, 1981) and *Cablecom-General, Inc.* v. *Crisp*, CIV-81-290-W (W.D. Okla. December 18, 1981). The plaintiffs of *Cablecom-General, Inc.* v. *Crisp*, CIV-81-290-W (W.D. Okla. December 18, 1981) are the petitioners in the present matter.

On May 19, 1982, the Honorable Lee R. West entered an order staying *Oklahoma Press Ass'n* v. *Crisp*, CIV-82-44-W (W.D. Okla.). The court entered the stay because appeal before the United States Court of Appeals for the Tenth Circuit had been instituted and involved the same legal issues stated against the same defendant and because the decision of the United States Court of Appeals for the Tenth Circuit might dispose of some, if not all, the issues in the stayed proceedings. On January 24, 1983, the United States Court of Appeals for the Tenth Circuit decided *Oklahoma Telecasters Ass'n* v. *Crisp*, 699 F.2d 490 (10th Cir. 1983). On February 15, 1983, the mandate from the Tenth Circuit issued to the Western District of Oklahoma in *Oklahoma Telecasters Ass'n* v. *Crisp*, 699 F.2d 490, No. 82-1058 (10th Cir. 1983). On April 4, 1983, issuance of the mandate from the Tenth Circuit to the Western District of Oklahoma was stayed pending this Court's disposition of the present petition for certiorari in *Cablecom-General, Inc.* v. *Crisp*, 699 F.2d 490, No. 82-1061 (10th Cir. 1983).

The preliminary injunctions granted to the Oklahoma Press Association and the Outdoor Advertising Association

of Oklahoma are still in effect. Their dissolution will presently be considered in light of the Tenth Circuit's opinion in *Oklahoma Telecasters Ass'n* v. *Crisp*, 699 F.2d 490 (10th Cir. 1983). The action taken by this Court on the Petition for Writ of Certiorari in this matter will in all practical and actual effect dispose of some, if not all, of the issues in *Oklahoma Press Ass'n* v. *Crisp*, CIV-82-44-W (W.D. Okla.), currently stayed before the United States District Court for the Western District of Oklahoma.

Consequently, the interests of the Oklahoma Press Association and the Outdoor Advertising Association of Oklahoma are substantially identical to the interests of the petitioners requesting Writ of Certiorari from this Court to the United States Court of Appeals for the Tenth Circuit.

SUMMARY OF ARGUMENT

The decision of the court below allows the State of Oklahoma to continue an absolute and blanket suppression of truthful advertising of a lawful product despite this Court's general admonitions that a state may not single out commercial speech of a particular content and seek to prevent its dissemination completely and that a state may not discourage purchase of an advertised product by suppressing commercial speech concerning that product. The decision below further allows this complete ban of commercial speech to stand despite this Court's statements concerning the circumstances under which a blanket suppression and ban may be enacted. The commercial speech banned by Oklahoma is neither misleading nor related to an unlawful activity, yet the court below upholds the state's ban of such commercial communications.

The court below allows this ban even though this Court in particular cases has supported the proposition that absolute bans of commercial communications are not permitted by the First Amendment unless they are misleading or related to unlawful activity. In so doing, the decision below has failed to enforce those interests that are at the heart of the First Amendment's concern in protecting commercial speech, that is, that the flow of commercial information be free in order that individual and societal interests in informed and reliable decision making concerning the availability, nature and prices of products and services be preserved.

The decision of the court below incorrectly has balanced the relationship between the Twenty-first Amendment and the First Amendment. In balancing this relationship, the court below has decided that a state's power under the Twenty-first Amendment to ban entirely the sale and consumption of alcoholic beverages necessarily entails any regulation of commercial speech concerning alcoholic beverages, including the outright ban of such speech. The court has analyzed all states who have chosen to prohibit some but not all forms of liquor advertising with the goal of decreasing the consumption and abuse of alcoholic beverages to be similarly situated regarding any First Amendment restrictions on their ability to regulate alcoholic beverage advertising. Because Oklahoma's allowed communication concerning alcoholic beverages is at the limit of the smallest communication that may be permitted, the court below has stated that the State's power to ban the sale and consumption of alcoholic beverages is the same thing as the power to ban commercial communications concerning

alcoholic beverages. That decision ignores this Court's statements to the contrary, which require that conflicts between the Twenty-first Amendment and other parts of the Constitution be resolved by the analyses existing under the law concerning those parts of the Constitution.

ARGUMENT

I. THE DECISION OF THE COURT BELOW AFFIRMS A BLANKET SUPPRESSION OF COMMERCIAL SPEECH OF A PARTICULAR CONTENT IN CONFLICT WITH THE DECISIONS OF THIS COURT.

The decision[1] of the court below, the United States Court of Appeals for the Tenth Circuit, allows the State of Oklahoma to continue an absolute and blanket suppression[2] of truthful advertising of a lawful product despite this Court's admonitions to the contrary. This Court has stated that a state may not single out speech of a particular content and seek to prevent its dissemination completely. *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (1976). Further, it is

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[1] *Oklahoma Telecasters Ass'n* v. *Crisp*, 699 F.2d 490 (10th Cir. 1983).

[2] Article 27, section 5 of the Oklahoma Constitution makes it "unlawful for any person, firm or corporation to advertise the sale of alcoholic beverages within the State of Oklahoma, except one sign at the retail outlet bearing the words 'Retail Alcholoic Liquor Store.'" The Oklahoma Statutes enact this constitutional prohibition as follows: "it shall be unlawful for any person, firm or corporation to advertise any alcoholic beverages or the sale of same within the State of Oklahoma, except one sign at the retail outlet bearing the words 'Retail Alcoholic Liquor Store' or any combination of such words, or any of them, and no letter in any such sign shall be more than four (4) inches in height, or more than three (3) inches in width, and if more than one line is used, the lines shall not be more than one (1) inch apart." 37 Okla. Stat. § 516 (1981).

highly doubtful whether commercial speech may be suppressed in order to further a state's interest in discouraging purchase of the advertised product. *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557, 566 n.9 (1980). Nevertheless, the United States Court of Appeals for the Tenth Circuit has approved provisions of Oklahoma law[3] that single out speech having the particular content of advertising alcoholic beverages and seek to prevent its dissemination completely. In addition, the court below approved Oklahoma's suppression of liquor advertising even though it recognized that Oklahoma's interest in prohibiting the advertising of alcoholic beverages was to discourage purchase of the advertised product, that is, "to reduce the sale and consumption of liquor, and thereby reduce the problems associated with alcohol abuse."[4]

The decision of the court below approves Oklahoma's blanket suppression and ban of alcoholic beverage advertising contrarily to decisions of this Court stating under what circumstances such a blanket suppression and ban may be enacted. A state may ban those forms of commercial communication more likely to deceive the public than to inform it and that commercial speech related to an illegal activity. A state's power to ban commercial communications that are neither misleading nor related to unlawful activity is a power more circumscribed than the power to ban those communications. *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557, 563-64 (1980). This principle of *Central Hudson Gas* was later refined in the case of *In re R.M.J.*, 102 S.Ct. 929 (1982).

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[3] Okla. Const. art. 27, § 5; 37 Okla. Stat. § 516 (1981).

[4] *Oklahoma Telecasters Ass'n* v. *Crisp*, 699 F.2d at 500.

This Court there declared that a state may justify an absolute prohibition of a particular content or method of advertising only if the advertising is inherently misleading or demonstrably misleading from past experience. In addition, a state may not absolutely prohibit advertising that is only potentially misleading. *In re R.M.J.*, 102 S.Ct. 929, 937 (1982). Despite these statements of this Court, the court below sanctioned Oklahoma's absolute prohibition and blanket ban on commercial speech having the particular content of advertising alcoholic beverages even though the court below recognized that the advertisements in question were neither false nor misleading.[5]

In recent years, this Court has not approved a blanket ban on commercial speech unless the expression itself was flawed in some way, either because it was deceptive or related to unlawful activity. *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557, 566 n.9 (1980). The decision below ignores the truth of this statement as found in the particular decisions of this Court. For example, the absolute prohibition on advertising of areas of attorney practice in language other than that specifically provided by ethical rule violates the First Amendment. *In re R.M.J.*, 102 S.Ct. 929, 938 (1982). In addition, the absolute prohibition on advertising by courts of states in which an attorney has been admitted to practice violates the First Amendment. *Id.* This Court has found that the complete suppression of an electric utility's promotional advertising impermissibly abridges free speech. *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557, 571 (1980). Moreover, this Court has held

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[5] *Oklahoma Telecasters Ass'n* v. *Crisp*, 699 F.2d at 499-500 nn. 7-9.

that the absolute prohibition of price advertising of prescription drugs also violates the First Amendment. *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 770 (1976). All these decisions find impermissible an absolute prohibition of commercial speech of a certain content.

The decision below, in ignoring these decisions, further ignores the principle that the informational function of advertising is at the heart of the First Amendment's concern in protecting commercial speech. *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557, 563 (1980). A commercial advertisement is constitutionally protected not so much because it pertains to the seller's business as because it furthers the societal interest in the "free flow of commercial information." *First National Bank of Bellotti*, 435 U.S. 765, 783 (1978); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 764 (1976). The decision below repudiates this societal interest in the free flow of commercial information by denying the public's right to be informed "of the availability, nature, and prices of products and services . . ." concerning alcoholic beverages. *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 364 (1977). "[S]uch speech serves individual and societal interest in assuring informed and reliable decisionmaking." *Id.* The decision below permits the State of Oklahoma to decide for each individual in Oklahoma that he has no interest in informed and reliable decisionmaking concerning the availability, nature, and prices of products and services associated with alcoholic beverages. The court below permits this statist interruption in the flow of commercial information even though

it finds that "[t]he sale and consumption of alcoholic beverages, though heavily regulated, is lawful within the State of Oklahoma."[6] The decision below thus conflicts with this Court's statement of the fundamental principle underlying the First Amendment's protection for commercial speech. "[A] State may not completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients." *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 773 (1976). The First Amendment requires an alternative to this highly paternalistic approach. "That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them." *Id.* at 770. Liquor "[a]dvertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price"[7] *Id.* at 765.

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[6] *Oklahoma Telecasters Ass'n* v. *Crisp*, 699 F.2d at 500. See also Oklahoma Alcoholic Beverage Control Act, 37 Okla. Stat. §§ 501-563 (1981).

[7] This Court in *Virginia Pharmacy* noted: "Obviously, not all commercial messages contain the same or even a very great public interest element. There are a few to which such an element, however, could not be added." *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 764 (1976). Various aspects of the sale and consumption of alcoholic beverages recur as objects of political concern in Oklahoma. For example, the latest recurrence of the ongoing attempt to legalize liquor by the drink in Oklahoma is a recently announced initiative petition drive for a county option plan that would allow the voters of each county to decide whether that county should be wet or

II. THE COURT BELOW HAS DECIDED AN IMPORTANT CONSTITUTIONAL QUESTION CONCERNING THE RELATIONSHIP OF THE TWENTY-FIRST AMENDMENT AND THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION IN CONFLICT WITH THE DECISIONS OF THIS COURT.

The United States Court of Appeals for the Tenth Circuit in its decision below has decided the proposition that a state in exercising its powers under the Twenty-first Amendment may engage in all forms of speech-burdensome regulation of alcoholic beverages as an incident of its Twenty-first Amendment power to ban completely the sale and distribution of alcoholic beverages within the state. The court below decided that proposition in the affirmative even though no published decision of this Court has established this proposition. The court below relied heavily on *Queensgate Investment Company* v. *Liquor Control Commission*,[8] a summary decision of this Court.

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[7] (Continued)

dry. See The Daily Oklahoman, June 16, 1983, at p.8, col. 3. The conflation of political and commercial messages concerning alcoholic beverages is an obvious method by which liquor producers may advertise their products. "Drink Seagram's and support liquor by the drink," and, "Vote to drink Seagram's by the drink," are but two crude examples. The net result of this joinder of political and commercial expression available to liquor advertisers in Oklahoma is that allowing the decision of the court below to stand requires this Court potentially to participate in the replication of vain acts of combining political assertions of public interest with commercial speech concerning alcoholic beverages. Cf. *Bigelow* v. *Virginia*, 421 U.S. 809, 822 (1975) (commercial advertisement also containing factual material of clear public interest).

[8] 103 S.Ct. 31 (1982). This summary dismissal dismissed an appeal from the Ohio Supreme Court, whose decision is reported *eo nomine* at 433 N.E.2d 138 (Ohio 1982).

The court below found that *Queensgate* was precedential authority for the proposition that "the Twenty-first Amendment in some way enhances a state's authority to regulate commercial speech concerning alcoholic beverages."[9] The court below further found a "crucial similarity" between *Queensgate* and the present case: "in both cases, the state, acting under its powers granted by the Twenty-first Amendment, has chosen to prohibit some, but not all,[10] forms of liquor advertising with the goal of decreasing the consumption and abuse of alcoholic beverages."[11] The court reasoned that because Oklahoma allows liquor advertising on one sign at a retail liquor store[12] and by exercise of administrative discretion, Oklahoma

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[9] *Oklahoma Telecasters Ass'n* v. *Crisp*, 699 F.2d at 497.

[10] This analysis by the court below of the similiarity between Ohio's scheme of regulating liquor advertising and Oklahoma's scheme is fairly ludicrous. Oklahoma prohibits all communications of liquor advertising by all speakers in all media except the communications explicit and implicit in the four words "Retail Alcoholic Liquor Store" allowed on one sign at a retail liquor store. Okla. Const. art. 27, § 5; 37 Okla. Stat. § 517 (1981). Consequently, Oklahoma completely prohibits all other communications by all other speakers in all other media concerning liquor advertising. Ohio *allows* all communications of liquor advertising by all speakers in all media except that certain liquor permit holders may not advertise the price per bottle or drink of any alcoholic beverage nor may they in any manner refer to price or price advantage except within their premises. *Queensgate Investment Co.* v. *Liquor Control Commission*, 433 N.E.2d at 139 n.1. This analysis by the court below of this "crucial similarity" is further called into question by that court's recognition that the Oklahoma "laws here in question are indeed broader than the regulation in *Queensgate*. . . ." *Oklahoma Telecasters Ass'n* v. *Crisp*, 699 F.2d at 497.

[11] *Oklahoma Telecasters Ass'n* v. *Crisp*, 699 F.2d at 497.

[12] Okla. Const. art. 27, § 5; 37 Okla. Stat. § 516 (1981).

"allows"[13] liquor advertising. Nevertheless, liquor adver-

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[13] The Tenth Circuit noted: "On-premises advertising is allowed, the rebroadcast of beer advertising is not prohibited, and alcoholic beverage advertising in out-of-state printed publications distributed in Oklahoma is allowed. Although Appellees bear a disproportionate burden of the regulation, Oklahoma has not eliminated the dissemination of information concerning alcoholic beverages. With particular emphasis on the power of Oklahoma under the Twenty-first Amendment, we hold that the advertising prohibitions here are no more extensive than is necessary to serve Oklahoma's asserted interest. Article XXVII, § 5 of the Oklahoma Consituation and Section 516 of title 37 of the Oklahoma Statutes, are valid restrictions on commercial speech and do not violate the Appellees' First Amendment rights." *Oklahoma Telecasters Ass'n* v. *Crisp*, 699 F.2d at 502.

It is unclear what part the exercise of administrative discretion by the Director of the Oklahoma Alcoholic Beverage Control Board not to enforce Oklahoma's liquor advertising laws against certain advertisers or concerning certain subjects influences the court below. To the extent that the decision of the court below was influenced in Oklahoma's favor by this exercise of administrative discretion, the court below has failed to recognize that a person having merely a commercial interest in speech may "challenge the facial validity of a statute on the grounds of its substantial infringement of the First amendment interests of others." *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490, 504 n.11 (1981). The court below has further failed to follow the example of this Court in assuming that a statute facially attacked on the basis of commercial speech actually effectuates its goals and purposes. See *Larkin* v. *Grendel's Den, Inc.*, 103 S.Ct. 505, 510 n.6 (1982).

To the extent that this exercise of administrative discretion did not form a part of the decision below, the court below failed to consider whether this exercise of administrative discretion was consonant with First Amendment values. A more complete record would be necessary to consider this question properly.

Further, to state that the rebroadcast of beer advertising is not prohibited overstates the situation in Oklahoma. Two kinds of beer are sold in Oklahoma, a nonalcoholic beverage containing less than 3.2% of alcohol by weight, and an alcoholic beverage containing more than 3.2% alcohol by weight. Until recently, more beer in Oklahoma was sold by

tising in Oklahoma, as advertising is commonly thought

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[13] (Continued)

brewers who marketed both an alcoholic and a nonalcoholic beer in the same packaging except for the notation of the alcohol content. In a franchising dispute with the State of Oklahoma unrelated to the present advertising question, most or all of these brewers marketing both alcoholic and nonalcoholic beer in Oklahoma ceased to market alcoholic beer in Oklahoma. Before this withdrawal from the state of alcoholic beer, beer advertising for alcoholic and nonalcoholic beer was indistinguishable. Since this withdrawal, beer advertising is for nonalcoholic beer only.

Another set of brewers have marketed only alcoholic beer in the State of Oklahoma. Since the withdrawal of the major brands of their alcoholic beer from Oklahoma, Oklahoma has seen many new marketers of alcoholic beer enter the Oklahoma market. To the knowledge of these friends of the court, advertisement of a beer marketed in Oklahoma only as alcoholic beer is not permitted. These friends of the Court suspect that the court below has been misled concerning the regulation of alcoholic beverages in Oklahoma. For example, Oklahoma has been able to rely on the Oklahoma Alcoholic Beverage Control Act, 37 Okla. Stat. §§ 501-563 (1981), to establish that the "sale and consumption of alcoholic beverages though heavily regulated, is lawful within the State of Oklahoma." *Oklahoma Telecasters Ass'n* v. *Crisp*, 699 F.2d at 500. In reality, the arbitrary exercise of administrative discretion in selecting which provisions of the Oklahoma Alcoholic Beverage Control Act to enforce are far more egregious than anyone outside Oklahoma is likely to realize. Although it is illegal to serve an alcoholic beverage by the drink or by the glass in Oklahoma, owners of taverns, restaurants and bars in the counties containing and surrounding Oklahoma's two urban areas, Tulsa and Oklahoma City, routinely serve alcoholic beverages by the glass or drink with impunity, often having daily or weekly "happy hours" during the afternoon traffic rush. Observers of the Oklahoma scene would find that the State of Oklahoma makes little or no attempt to discourage this activity. Nevertheless, at the same time, the Oklahoma Alcoholic Beverage Control Board wishes to pass itself off as representing the interests of the people against the interests of those beverage marketers who wish to encourage even higher levels of intoxication. In reality, enforcement of the Oklahoma Alcoholic Beverage Control Act is in no small state of disarray, and arbitrary exercises of administrative discretion are common.

of,[14] is completely prohibited, and the court below has decided that a state may exercise Twenty-first Amendment powers to infringe upon commercial expression in any manner it chooses short of the total eradication of the indications of commercial existence[15] that would be justified in association with a state's making the sale and consumption of alcoholic beverages illegal.

Because of its Twenty-first Amendment analysis, the court below found the asserted state interest of Oklahoma to be "exceptionally strong."[16] In its balancing the values[17] of this "exceptionally strong" asserted state interest against First Amendment values, the court below failed to recognize what this Court has long recognized: "that even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment." *Minneapolis Star and Tribune Co.* v. *Minnesota Commissioner of Revenue*, 103 S.Ct. 1365, 1376 (1983).

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[14] Not all forms of advertising increase the overall sale of a particular product. See Note, *Electric & Gas Utility Advertising: The First Amendment Legacy of Central Hudson Gas*, 60 Wash. U.L.Q. 459 (1981). The Oklahoma provisions reach all liquor advertising, regardless of the impact of the touted liquor on overall liquor consumption. Cf. *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. at 570.

[15] *E.g.*, signs advertising that alcoholic beverages are for sale at a particular business location.

[16] *Oklahoma Telecasters Ass'n* v. *Crisp*, 699 F.2d at 500.

[17] The court below stated the issue of the present matter as follows: "The resolution of this issue involves an examination of the relative interests at stake; that is, we must balance the right of Telecasters and the cable operators to engage in commercial speech against the right of Oklahoma, through its general police powers as enhanced by the Twenty-first Amendment, to regulate commercial speech relating to alcoholic beverages." *Ok-*

Although the Twenty-first Amendment grants states wide latitude in state liquor regulation, this Court has resisted the notion that the Twenty-first Amendment frees the states from all restrictions upon the police power to be found in other provisions of the Constitution. *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 108 (1980). Indeed, decisions of this Court:

> have stressed that important federal interests in liquor matters survived the ratification of the Twenty-first Amendment. The States cannot tax imported liquor in violation of the Export-Import Clause. *Department of Revenue* v. *James Beam Company*, 377 U.S. 341, 84 S.Ct. 1247, 12 L.Ed.2d 362 (1964). Nor can they insu-

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[17] (Continued)

lahoma Telecasters Ass'n v. *Crisp*, 699 F.2d at 498. The court below then assertedly applied the analysis of *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980), in order to balance these rights. *Id.* at 499-502.

The citations of law afforded by this brief have been presented within a predominantly categorical framework. These categorical formulations are particularly applicable to the fourth part of the description of commercial speech analysis presented in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557, 566 (1980); the government regulation must not be more extensive than is necessary to serve the asserted governmental interest. Indeed, the court below has misconceived this fourth part of the *Central Hudson Gas* formulation: "With particular emphasis on the power of Oklahoma under the Twenty-first Amendment, we hold that the advertising prohibitions here are no more extensive than is necessary to serve Oklahoma's asserted interest." *Oklahoma Telecasters Ass'n* v. *Crisp*, 699 F.2d at 502. This Court has recently given indication of the application of this fourth part of the *Central Hudson Gas* formulation. Where it is not clear that an absolute prohibition on commercial speech is the only solution in support of the asserted state interest and there is no indication of a failed effort by a state to proceed along a less restrictive path in order to further its interests, a restriction on commercial speech must fall. *In re R.M.J.*, 102 S.Ct. 929, 939 (1982).

> late the liquor industry from the Fourteenth Amendment's requirements of equal protection, *Craig* v. *Boren*, 429 U.S. 190, 204-209, 97 S.Ct. 451, 460-463, 50 L.Ed.2d 397 (1976), and due process, *Wisconsin* v. *Constantineau*, 400 U.S. 433, 436, 91 S.Ct. 507, 509, 21 L.Ed.2d 515 (1971).

Id. Nor may a state exercise its power under the Twenty-first Amendment in a way that impinges upon the Establishment Clause of the First Amendment. *Larkin* v. *Grendel's Den, Inc.*, 103 S.Ct. 505, 510 n.5 (1982).

The court below has overbalanced Oklahoma's interest in favor of the Twenty-first Amendment and has failed to recognize that the First Amendment is the device determining the extent of state "regulation of advertising . . . related to activities the state may legitimately *regulate or even prohibit.*" *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 760-61 (1976) (emphasis added). Further, the court below has failed to recognize that it "is precisely this kind of choice, between the dangers of suppressing information, the dangers of its

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[15] (Continued)

Oklahoma repealed prohibition and adopted the current advertising restrictions simultaneously, and Oklahoma has never attempted any method of regulation other than an all-out prohibition of alcoholic beverage advertising. See *Oklahoma Telecasters Ass'n* v. *Crisp*, 699 F.2d at 502 (concurring opinion). At least one commentator has stated that the commercial speech cases of this Court are explained by this Court's procedure of assuming that commercial speech should be covered by the First Amendment and then subcategories of commercial advertising should be excluded only if they are "shown to be unrelated to the purposes of a principle of freedom of speech." Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 Vand. L. Rev. 265 (1981). At the least, Oklahoma's prohibitions reach liquor advertising having no effect on overall liquor consumption (*e.g.*, market share advertising). See note 14 *supra*.

misuse if it is freely available, that the First Amendment makes for us." *Id.* at 770.

Finally, the decision below fails to recognize that the potential of Oklahoma to make legal or illegal commercial activity forming the subject matter of advertising cannot justify a restriction on the speech of a commercial speaker. Thus, a state's power to create a corporation does not, in and of itself, justify a restriction on that corporation's speech. *First National Bank* v. *Bellotti*, 435 U.S. 765, 778 n.14, 780 n.16 (1978). That Oklahoma may make the sale and consumption of liquor illegal cannot justify restrictions on speech concerning that activity. The decision below thus fails to recognize that the "inherent worth of . . . speech in terms of its capacity for informing the public does not depend upon the identity of its source. . . ." *Id.* at 777.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted to review the judgment of the United States Court of Appeals for the Tenth Circuit.

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No. 82-1795

In the Supreme Court of the United States

OCTOBER TERM, 1982

CAPITAL CITIES CABLE, INC., ET AL., PETITIONERS

v.

RICHARD A. CRISP, DIRECTOR, OKLAHOMA ALCOHOLIC BEVERAGE CONTROL BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM OF THE FEDERAL COMMUNICATIONS COMMISSION AS AMICUS CURIAE

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM OF THE FEDERAL COMMUNICATIONS COMMISSION AS AMICUS CURIAE

INTEREST OF THE FEDERAL COMMUNICATIONS COMMISSION

The Federal Communications Commission has authority over all interstate and foreign communication by wire and radio, including cable television systems, for the purpose of making available "to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service." 47 U.S.C. 151, 152(a). The Oklahoma law requiring state cable systems to delete liquor advertisements broadcast by out-of-state television stations has a significant impact upon the regulatory interests of the Commission. The advertising ban, if enforced, will substantially interfere with the ability of cable broadcasters to comply with valid Commission regulations and will impose a serious loss of television service on Oklahoma viewers. In

particular, some cable systems will have to cease carrying out-of-state programming that is required to be carried under the FCC's mandatory signal carriage rules. The court of appeals' decision, moreover, will hinder the provision of television service to rural and other underserved areas in Oklahoma and undermine the federal policy favoring competition and diversity in television programming.

STATEMENT

1. In the Communications Act of 1934, 47 U.S.C. 151 *et seq.*, Congress assigned the FCC the task of regulating the field of broadcasting in the "public convenience, interest, or necessity * * *." 47 U.S.C. 307(a). The Act provides that broadcast licenses must be distributed "among the several States and communities [so] as to provide a fair, efficient, and equitable distribution of radio service to each of the same." 47 U.S.C. 307(b). Pursuant to this mandate, the Commission has created a system of locally oriented television broadcasting by carefully allocating broadcast stations to communities throughout the nation and by requiring broadcast licensees to serve those communities. See *FCC* v. *Allentown Broadcasting Co.*, 349 U.S. 358, 362 (1955); *Sixth Report & Order in Docket Nos. 8736, et al.*, 41 F.C.C. 148 (1952).

The Commission is authorized to regulate cable television to the extent that such regulation is "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." *United States* v. *Southwestern Cable*, 392 U.S. 157, 178 (1968) ("Southwestern Cable").[1] This authority has been exercised both for the purpose of protecting the "system of local television broadcasting," *Southwestern Cable*,

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[1]The Communications Act has been held to apply to cable television, even though that technology did not exist at the time of passage of the Act. *United States* v. *Southwestern Cable*, *supra*, 392 U.S. at 167-169; 47 U.S.C. 152(a), 153(a).

supra, 392 U.S. at 177, and in order "to promote the objectives for which the Commission had been assigned jurisdiction over broadcasting." *United States* v. *Midwest Video Corp.*, 406 U.S. 649, 667 (1972) (plurality opinion).[2] Although state and local governments are free to regulate certain aspects of cable television, the FCC has preempted state regulation in a number of respects, including cable system carriage of broadcast signals. *Report & Order in Docket No. 20272*, 54 F.C.C. 2d 855, 863 (1975); *Clarification of the Cable Television Rules*, 46 F.C.C. 2d 175, 178 (1975).[3]

The Commission has long recognized the important public benefits that cable television provides. For example, cable television "has made a significant contribution to meeting the public demand for television service in areas too small in population to support a local station or too remote in distance or isolated by terrain to receive regular or good off-the-air reception." *Second Report & Order in Docket Nos. 14895, et al.*, 2 F.C.C. 2d 725, 781 (1966), aff'd *sub nom. Black Hills Video Corp.* v. *FCC*, 399 F.2d 65 (8th Cir. 1968). The record in this case, moreover, indicates that

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[2]Although cable systems usually serve an area contained within the borders of a single state, cable communications are deemed interstate in nature even when they consist of broadcast signals emanating from stations in the same state. *Southwestern Cable*, *supra*, 392 U.S. at 168-169, 172-173.

[3]The Commission has also asserted exclusive jurisdiction over "pay cable, leased channel regulations, technical standards, access, and several aspects of franchise responsibility." *Report & Order in Docket No. 20272*, *supra*, 54 F.C.C. 2d at 863. State and local authorities in turn may regulate "the non-operational aspects of cable franchising including bonding agreements, maintenance of rights-of-way, franchise selection and conditions of occupancy and construction • • •." *Ibid.* See *Brookhaven Cable TV, Inc.* v. *Kelly*, 573 F.2d 765 (2d Cir. 1978), cert. denied, 441 U.S. 904 (1979) (upholding the preemptive effect on state and local regulation of the Commission's decision not to regulate rates for pay cable television programming).

in some towns in Oklahoma, the only available television signals are those of out-of-state stations imported by cable operators. See Pet. 6.

The Commission has also expressed some concern that the importation of distant television signals by cable could reduce the audiences and therefore the revenues of local television stations, with the possible result that local programming would diminish or the stations themselves cease operations.[4] The Commission, therefore, adopted rules in 1965 that required microwave-served cable systems to carry certain television signals that were available over-the-air (the "must carry" rules), and to delete certain imported network programming that duplicated local programs (the "network nonduplication" rules). *First Report & Order in Docket Nos. 14895, et al.*, 38 F.C.C. 683 (1965), aff'd *sub nom. Black Hills Video Corp.* v. *FCC*, 399 F.2d 65 (8th Cir. 1968). In 1966, the Commission extended these rules to all cable sytems. In addition, it imposed substantial restrictions upon the importation of distant television signals by cable systems (the "distant signal" rules). *Second Report & Order in Docket 14895, et al.*, 2 F.C.C. 2d 725 (1966), aff'd *sub nom. Black Hills Video Corp.* v. *FCC*, 399 F.2d 65 (8th Cir. 1968).[5] These rules were designed to guarantee that

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[4] *Cable Television Report & Order (Docket Nos. 18397, et al.)*, 36 F.C.C. 2d 143, 164, 165 (1972), aff'd *sub nom. American Civil Liberties Union* v. *FCC*, 523 F.2d 1344 (9th Cir. 1975); *Second Report & Order in Docket Nos. 14895, et al.*, 2 F.C.C. 2d 725, 781 (1966), aff'd *sub nom. Black Hills Video Corp.* v. *FCC*, 339 F.2d 65 (8th Cir. 1968); *First Report & Order in Docket Nos. 14895, et al.*, 38 F.C.C. 683, 700, 713 (1965). See *Arlington Telecommunications Corp.*, 70 F.C.C. 2d 2291, 2298-2299 (1979), appeal dismissed *sub nom. Committee to Balance the Impact Gaff & Make ARTEC Constitutional*, No. 79-1303 (D.C. Cir. Feb. 5, 1982).

[5] These restrictions were relaxed somewhat in subsequent Commission decisions. For a comprehensive description of the history of the FCC's signal carriage rules, see *Inquiry into the Economic Relationship between Television Broadcasting & Cable Television*, 71 F.C.C. 2d 632, 644-659 (1979).

cable subscribers would continue to receive all available local signals, that the relative competitive positions of the stations in the area would be preserved, and that the system of local broadcasting created by the Commission under Section 307(b) of the Communications Act would not be undermined by undue competition from cable systems. *Second Report & Order in Docket Nos. 14895, et al., supra,* 2 F.C.C. 2d at 735-736; *First Report & Order in Docket Nos. 14895, et al., supra.*

The "must-carry" and "network nonduplication" rules outlined above are still in effect today, although in somewhat modified form.[6] In 1980, however, the Commission re-examined the "distant signal" rules and concluded that these particular rules were no longer necessary to protect the viability of broadcast stations and the sytem of local broadcasting.[7] In addition, the "distant signal" rules were found to restrict competition and diversity in the provision of television programming, to the detriment of the public. *Cable Television Syndicated Program Exclusivity Rules,* 79 F.C.C. 2d 663, 813-814 (1980), aff'd *sub nom. Malrite T.V.* v. *FCC,* 652 F.2d 1140 (2d Cir. 1981), cert. denied, 454 U.S. 1143 (1982).

The Copyright Act of 1976 establishes a compulsory licensing system for the carriage of television signals by cable systems. Section 101(c)(3) of the Copyright Act, 17

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[6] 47 C.F.R. 76.51-61 (1980) (must-carry); 47 C.F.R. 76.92-99 (network nonduplication). The only other present restriction on cable system signal carriage is the requirement that certain sporting events not be broadcast if the events are not available over-the-air. 47 C.F.R. 76.67.

[7] Even before the repeal of the distant signal rules in 1980, the Commission had relaxed its policy regarding waiver of these rules, in large part because of its belief that the First Amendment would not permit any restriction on cable system signal carriage that was not necessary to protect local broadcasters. *Arlington Telecommunications Corp.,* 70 F.C.C. 2d 2291, 2300 (1979).

U.S.C. (Supp. V) 111(c)(3), requires cable systems, in order to avail themselves of the benefits of the statutory scheme,[8] to carry broadcast signals intact, without deleting any material, including advertisements.[9] This requirement is designed to protect the advertiser, and thus the copyright holder, since the latter's compensation "is directly related to the size of the audience that the advertiser's message is calculated to reach." H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 94 (1976). The statute also protects local broadcasters, by preventing a cable system from inserting advertising without having to bear the same program costs that broadcasters must bear. *Ibid.*

A prohibition against the deletion of advertisements from retransmitted signals is also contained in the Commission's rules. 47 C.F.R. 76.55(b); *Second Report & Order in Docket Nos. 14895, et al., supra,* 2 F.C.C. 2d 725, 756. The FCC rule "is designed to prevent a loss of revenues to local broadcasters sufficient to result in reduced service to the public." *Garland B. Pugh,* 68 F.C.C. 2d 997, 999 (1978).[10]

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[8]Cable operators are permitted under the Copyright Act's "compulsory license" scheme to retransmit any broadcast signal without making individual arrangements with the broadcast licensee. 17 U.S.C. (Supp. V) 111(c). Instead, cable sytems make payments to a royalty pool which is then divided among broadcasters. 17 U.S.C. (Supp. V) 111(d). The compulsory license system was created in order to enable cable systems to carry the signals permitted by the FCC without having to negotiate with every copyright owner whose work the cable operator retransmitted. H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 89 (1976).

[9]The Act contains a minor exception, not applicable here, for "those engaged in television commercial advertising market research." 17 U.S.C. (Supp. V) 111(c)(3).

[10]At one time, the Commission conducted an inquiry to determine the technical feasibility of permitting cable systems to substitute advertising from local stations in place of the advertisements of distant signals, but rejected the proposal as unworkable. *Cable Television Report & Order (Docket Nos. 18397, et al.), supra,* 36 F.C.C. 2d at 165.

2. The State of Oklahoma prohibits the advertising of alcoholic beverages, even though sale and consumption of alcohol is lawful in Oklahoma.[11] Oklahoma Alcoholic Beverage Control Act, Okla. Stat. Ann. tit. 37, § 516 (West Cum. Supp. 1982-1983); Okla. Const. Art. XXVII, § 5. For a number of years the ban has been enforced against television stations in Oklahoma that retransmit national network programs containing wine advertisements.[12] Notwithstanding the apparent breadth of the advertising ban, the Oklahoma Attorney General has ruled that the law does not apply to out-of-state print media sold in Oklahoma, and until 1980 the law was not enforced against cable television systems retransmitting out-of-state broadcast signals (Pet. App. 4a, 5a, 23a-24a). In March 1980, however, the Attorney General issued an opinion stating that retransmission of wine commercials by cable television systems violated Oklahoma law.[13] Cable operators were thereafter notified that they would be criminally prosecuted if such advertising is carried over their systems (Pet. App. 4a, 41a).

In March 1981, petitioners, several Oklahoma cable systems, filed suit in the United States District Court for the Western District of Oklahoma seeking declaratory and injunctive relief against Richard Crisp, Director of Oklahoma's Alcoholic Beverage Control Board. They argued

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[11]Oklahoma law does permit liquor stores to advertise using "strictly regulated on-premises signs" (Pet. App. 3a).

[12]The Oklahoma Supreme Court has found enforcement of the law against television stations to be consistent with the Commerce Clause of the United States Constitution. *Oklahoma Alcoholic Beverage Control Board* v. *Heublein Wines, Int'l*, 566 P.2d 1158 (Okla. 1977).

[13]Op. Okla. Att'y Gen. No. 79-334 (Mar. 19, 1980). Because beer containing less than 3.2% alcohol may be advertised, and because beer may sometimes contain less than 3.2% alcohol, beer commercials need not be deleted (Pet. App. 3a). At the time this case was brought, hard liquor generally was not advertised on television.

that application of the ban to cable carriage of out-of-state broadcast signals violated the Commerce and Supremacy Clauses, their free speech rights under the First and Fourteenth Amendments, and the Equal Protection Clause of the Fourteenth Amendment. On cross-motions for summary judgment, the district court, after applying the test set forth in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980), issued a permanent injunction barring enforcement of the Oklahoma law against petitioners, holding that the ban on liquor advertising was an unconstitutional restriction on the cable operators' First and Fourteenth Amendment right to engage in protected commercial speech. *Cable-Com General, Inc.* v. *Crisp*, No. CIV-81-290-W (W.D. Okla. Feb. 10, 1982) (Pet. App. 33a-50a).[14] The court of appeals reversed, holding that although the advertising at issue here was protected by the First Amendment, the Oklahoma ban was a valid restriction on commercial speech (Pet. App. 20a, 24a).[15]

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[14]The district court found that (1) cable systems import broadcast signals that originate outside Oklahoma and contain wine commercials; (2) federal law prohibits cable operators from modifying those signals; (3) cable operators "have no contractual relationship with the stations whose signals they carry, pay no fee to the stations for said signals, and have no voice in the programming carried by such stations;" (4) there is no feasible way for cable operators to delete advertising from imported signals; and (5) inability to carry out-of-state signals containing wine commercials "would probably cause a large but inherently immeasurable reduction in Plaintiffs' subscriber revenue" (Pet. App. 40a-42a).

[15]The court of appeals viewed this Court's summary dismissal of the appeal in *Queensgate Investment Co.* v. *Liquor Control Commission*, No. 81-2174 (Oct. 2, 1982), as controlling the result in the instant proceeding (Pet. App. 24a). In *Queensgate*, the Ohio Supreme Court upheld as consistent with the First and Fourteenth Amendments a partial ban on off-premises advertising of liquor prices by certain liquor permit holders. *Queensgate Investment Co.* v. *Liquor Control Commission*, 69 Ohio 2d 361, 433 N.E. 2d 138 (1982).

DISCUSSION

This case presents an important issue of federal law that warrants this Court's attention: whether, by regulating liquor advertising, a state may effectively ban cable broadcasters from carrying out-of-state programming. Although Oklahoma purports to ban only advertisements, federal copyright laws, FCC rules, and technical factors prohibit the deletion of advertising from broadcast signals transmitted by cable. Accordingly, Oklahoma's ban on liquor advertising will have the effect of preventing Oklahoma cable systems from retransmitting out-of-state broadcast signals to their subscribers, even if those signals originate in nearby states and are required to be carried by applicable FCC regulations. If allowed to stand, the court of appeals' decision will interfere with the FCC's regulatory authority and will diminish the diversity of broadcast voices available in Oklahoma, to the detriment of cable broadcasters and the broad interests of the viewers of Oklahoma.

1. The FCC believes that cable television is a valuable means of furthering the goals of the Communications Act. Among these goals is the provision, "so far as possible, to all the people of the United States [of] a rapid, efficient, Nationwide, and world-wide wire and radio communications service * * *" (47 U.S.C. 151), and the distribution of broadcast services "among the several States and communities [so] as to provide a fair, efficient, and equitable distribution of radio service to each of the same" (47 U.S.C. 307(b)). Because Oklahoma's advertising ban prohibits retransmission of *any* signal containing wine commercials, that ban interferes with the "fair, efficient, and equitable distribution" of television broadcast services within the state. 47 U.S.C. 307(b).

The Commission's cable television signal carriage rules are designed to serve the varied interests of broadcasters and television viewers. The rules, for example, assure that

rural areas and areas isolated by terrain can receive, via cable, the signals of stations that, although located nearby, may not provide good reception over-the-air. They also protect local stations against loss of their over-the-air audience. See pages 4-5, *supra*. The Oklahoma advertising ban, however, conflicts with these interests because it forces cable broadcasters to delete all out-of-state service that includes wine advertising —whether or not that service is available over-the-air or is required to be carried under the FCC's "must-carry" rules.[16] Indeed, if the state ban is upheld, approximately one-third of the land area of Oklahoma will lose signals now required to be carried under the FCC's "must-carry" rules (see 47 C.F.R. 76.51-65; *Television Factbook: Stations Volume* (1982-1983 ed.)); certain areas of the state, where over-the-air reception of signals is poor and Oklahoma signals are not available, will receive no television service at all.[17] Such results are inconsistent with the underlying goals of a local broadcasting system —a system that federal cable television regulation is intended not merely to protect but actively to promote. See *United States* v. *Midwest Video Corp.*, 406 U.S. 649, 667 (1972) (plurality opinion).

2. The Oklahoma law also interferes with a cable operator's freedom to select the programming it wishes to provide to its subscribers. This interference raises serious First Amendment concerns, to which the FCC has been sensitive

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[16]Cable systems complying with the ban are forced to delete all out-of-state signals because federal copyright law and FCC rules prohibit the deletion of advertising material from retransmitted signals. See pages 5-6, *supra*. Even if such deletion were lawful, practical difficulties would make it impossible for cable systems to carry distant commercial television signals, virtually all of which on occasion contain commercials for wine (Pet. App. 29a, 41a). See *Cable Television Report & Order (Docket Nos. 18397, et al.)*, *supra*, 36 F.C.C. 2d at 165; note 10, *supra*.

[17]Pet. 6; 2 Court of Appeals Record at 55.

in its own regulation of cable television, and threatens to dampen the diversity of broadcast voices that the Commission has recently endeavored to promote.

The FCC has recognized that restrictions on the signal carriage decisions of cable television operators may "violate the cable operator's First Amendment right to speak or publish." *Arlington Telecommunications Corp.*, 73 F.C.C.2d 766, 773 (1979), appeal dismissed *sub nom. Committee to Balance the Impact Gaff & to Make ARTEC Constitutional* v. *FCC*, No. 79-1303 (D.C. Cir. Feb. 5, 1982); *Tulsa Cable Television*, 74 F.C.C. 2d 382, 385 (1979). See also *Arlington Telecommunications Corp.*, 70 F.C.C. 2d 2291, 2300 (1979). The Commission, therefore, has regulated cable television signal carriage only where such regulation is believed to be necessary to protect local television service, and even then has fashioned its rules in such a way as to impose "the least possible restrictions on First Amendment freedoms * * *." *Tulsa Cable Television, supra*, 74 F.C.C. 2d at 385, citing *United States* v. *O'Brien*, 391 U.S. 367 (1968); *Arlington Telecommunications Corp., supra*, 70 F.C.C. 2d at 2299-2300.[18]

It is in pursuit of these First Amendment interests that the FCC found that its distant signal rules resulted in a substantial loss in competition and diversity. *Cable Television Syndicated Program Exclusivity Rules, supra*, 79 F.C.C. 2d at

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[18]Several circuits have upheld the FCC's distant signal carriage and network nonduplication rules as consistent with the First Amendment. *E.g., Great Falls Community TV Cable Co.* v. *FCC*, 416 F.2d 238, 242 (9th Cir. 1969) (nonduplication); *Black Hills Video Corp.* v. *FCC*, 399 F.2d 65, 67 (8th Cir. 1968) (must-carry, distant signal, and nonduplication); *Titusville Cable TV, Inc.* v. *United States*, 404 F.2d 1187, 1189-1190 (3d Cir. 1968) (nonduplication); *Buckeye Cablevision, Inc.* v. *FCC*, 387 F.2d 220, 225-226 (D.C. Cir. 1967) (distant signal). This Court has never passed upon the validity of the distant signal rules under the First Amendment.

813-814. See *Malrite TV* v. *FCC*, 652 F.2d 1140, 1151 (2d Cir. 1981). "[It] has long been a basic tenet of national communications policy that 'the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.' " *First Report & Order (CATV), Docket No. 18397*, 20 F.C.C. 2d 201, 205 (1969), aff'd *sub nom. United States* v. *Midwest Video Corp.*, 406 U.S. 649 (1972), quoting *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945) (other citations omitted).[19]

Although ostensibly aimed at limiting the consumption of alcohol, the advertising prohibition at issue here has a significantly broader impact.[20] Whatever its influence on

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[19]In Docket No. 18397 the Commission promulgated rules requiring cable systems to originate programming and to maintain facilities for local production. This Court upheld the Commission's authority under the Communications Act to adopt the rules. *United States* v. *Midwest Video Corp.*, 406 U.S. 649 (1972). In the plurality opinion, the Court cited the Commission's recognition of "the great potential of the cable technology to further the achievement of long-established regulatory goals in the field of television broadcasting by increasing the number of outlets for community self-expression and augmenting the public's choice of programs and types of services * * *." *Id.* at 654, quoting *First Report & Order in Docket No. 18397, supra*, 20 F.C.C. 2d at 202. The Commission later deleted the mandatory origination rule, finding that in view of the costs imposed on cable systems, origination should be voluntary. *Report & Order in Docket No. 19988*, 49 F.C.C. 2d 1090, 1104-1106 (1974). The equipment availability rule was part of a package of cable access channel rules that this Court invalidated in *FCC* v. *Midwest Video Corp.*, 440 U.S. 689 (1979). There, the Court found that Section 3(h) of the Communications Act, 47 U.S.C. 153(h), precluded the FCC from treating cable operators as common carriers. 440 U.S. at 708-709.

[20]This factor alone serves to distinguish this case from *Queensgate Investment Co.* v. *Liquor Control Board, supra*, so heavily relied upon by the court of appeals (Pet. App. 7a-9a, 13a-14a). The regulation in that case, as the court of appeals recognized, affected only the commercial speech of "liquor permit holders" (Pet. App. 14a). Here, by contrast, the advertising ban broadly restricts the dissemination of noncommercial speech by cable broadcasters.

liquor sales, the state ban on liquor advertising has the inevitable effect of banning the carriage of out-of-state broadcast signals by Oklahoma cable operators. Such a result limits the ranges of broadcast voices available in the state and thus undermines the national policy favoring the dissemination of information from varied and diverse sources.[21]

3. For the reasons stated above, the Commission believes that the decision of the court below was erroneous. If the decision is allowed to stand, certain cable broadcasters in Oklahoma will be faced with the choice of complying with state law or applicable FCC signal carriage rules; compliance with both will, in some circumstances, be impossible. The cable broadcaster cannot simply delete the offending advertisements because of the proscriptions of applicable FCC regulations and federal copyright law, nor can it simply discontinue the out-of-state signal in all instances because of the Commission's "must-carry" rules. The decision, as even the court below recognized, places cable broadcasters "in a difficult position" (Pet. App. 23a). More important, the decision below substantially interferes with the existing federal regulatory framework established to promote cable broadcasting.

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[21]Oklahoma cable subscribers, for example, will be deprived of the programming of distant out-of-state stations, including cable "superstations" whose programming has wide national appeal. Further, because carriage of out-of-state broadcast signals is what attracts many subscribers to cable, cable systems are likely to lose substantial revenues as a result of the ban (Pet. App. 42a). If cable systems cease operations, the public will be denied access not just to retransmitted television signals but also to other cable services, including special news, motion picture, and sports cable channels. *E.g.*, Cable News Network, Home Box Office, and the Entertainment and Sports Programming Network. The Oklahoma ban against wine commercials, therefore, threatens to result in a substantial loss in program availability and diversity for residents of Oklahoma.

We believe that this case warrants the attention of this Court. The questions presented by petitioners, however, focus exclusively on First Amendment concerns. Should the Court grant the petition in this case, it may wish to consider directing the parties to brief and argue the question whether the state's regulation of liquor advertising, as applied to out-of-state broadcast signals, is valid in light of existing federal regulation of cable broadcasting.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 1983

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No. 82-1795

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CAPITAL CITIES CABLE, INC.; COX CABLE OF OKLAHOMA CITY, INC.; MULTIMEDIA CABLEVISION, INC.; AND SAMMONS COMMUNICATIONS, INC.,
Petitioners,

v.

RICHARD A. CRISP, DIRECTOR, OKLAHOMA ALCOHOLIC BEVERAGE CONTROL BOARD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF FOR PETITIONER CAPITAL CITIES CABLE, INC.

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QUESTIONS PRESENTED

1. Whether a State, consistent with the protection of commercial speech under the First and Fourteenth Amendments, may adopt a sweeping ban on truthful, non-misleading advertising for a lawful product.

2. Whether a State, consistent with the First and Fourteenth Amendments, may prevent cable television operators from carrying out-of-state news and entertainment programs because those programs contain truthful, non-misleading advertising for wine.

3. Whether a State's regulation of advertising, as applied to out-of-state broadcast signals, is valid in light of existing federal regulation of cable broadcasting.

PARTIES TO THE PROCEEDING BELOW

The following were parties to the proceeding (No. 82-1061) in the United States Court of Appeals for the Tenth Circuit: Cablecom-General, Inc. (now Capital Cities Cable, Inc.); Cox Cable of Oklahoma City, Inc.; Multimedia Cablevision, Inc.; and Sammons Communications, Inc., appellees; and Richard A. Crisp, Director, Oklahoma Alcoholic Beverage Control Board, appellant.*

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* Petitioner Capital Cities Cable, Inc., construes the terms "parent companies," "subsidiaries," and "affiliates" in Rule 28.1 of the Rules of this Court to mean those corporations (1) whose shares are publicly traded; (2) in the case of "parent companies," which own a majority of the shares of a party; and (3) in the case of "subsidiaries" and "affiliates," a majority of whose shares are owned by a party. With the terms so defined, Capital Cities Cable, Inc., has a parent company, Capital Cities Communications, Inc., and no subsidiaries or affiliates.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-1795

CAPITAL CITIES CABLE, INC., *et al.*,
Petitioners,

v.

RICHARD A. CRISP, DIRECTOR,
OKLAHOMA ALCOHOLIC BEVERAGE CONTROL BOARD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR PETITIONER CAPITAL CITIES CABLE, INC.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 699 F.2d 490 (1983) and appears as Appendix A to the petition for writ of certiorari. The opinion of the United States District Court for the Western District of Oklahoma granting a preliminary injunction is not reported and appears as Appendix D to the petition. The district court's opinion on summary judgment is also not reported and appears as Appendix G to the petition.[1]

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[1] References to the appendices to the petition for writ of certiorari will be in the form "Pet. App." References to the Joint Appendix will be in the form "J.A."

JURISDICTION

The judgment of the court of appeals was entered on January 24, 1983. On March 21, 1983, the court of appeals denied a petition for rehearing filed by petitioners. Pet. App. B. The petition for certiorari was filed on May 3, 1983. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1976).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

This case involves the First, Fourteenth, and Twenty-first Amendments to the Constitution of the United States; Article 27, Section 5 of the Constitution of the State of Oklahoma; Section 516 of the Oklahoma Beverage Control Act, Okla. Stat. Ann. tit. 37, § 516; Section 111(c)(3) of the Copyright Act of 1976, 17 U.S.C. § 111 (c)(3); and Section 76.55(b) of the rules of the Federal Communications Commission, 47 C.F.R. § 76.55(b). These provisions are set forth in Pet. App. H. In addition, the case involves the Supremacy Clause of the United States Constitution, Art. VI, cl. 2, and Sections 76.57-.61 of the rules of the Federal Communications Commission, 47 C.F.R. §§ 76.57-61. These provisions are set forth in the Appendix to this brief.

STATEMENT OF THE CASE

Petitioners operate cable television systems in Oklahoma. Petitioners' cable service consists largely of signals originated outside Oklahoma by television stations and national cable programming services. Petitioners receive these signals by antenna, microwave receiver or satellite dish and simultaneously retransmit them by wire to their subscribers. J.A. 23, 30, 36. In this way, petitioners are able to offer their subscribers a diverse mix of news and entertainment programming from across the country.

Petitioners are required by the "must carry" rules of the Federal Communications Commission ("the Commission") to transmit the signals of certain nearby television stations. 47 C.F.R. §§ 76.57-.61 (1982). In some cases, the "must carry" rules oblige petitioners to carry signals broadcast by stations outside Oklahoma. J.A. 22, 35. Most of petitioners' out-of-state programming, however, is selected by the cable operators, and it is this programming which typically furnishes the systems' primary appeal to subscribers. J.A. 22, 37. Out-of-state programming voluntarily carried by petitioners includes the signals of commercial television stations located in neighboring Kansas, Missouri, and Texas and the signals of so-called "superstations" such as WTBS in Atlanta and WGN in Chicago.[2] J.A. 21, 35. This programming contains occasional commercials for brands of wine. J.A. 21, 25. The commercials are lawful under federal law and in the states where they originate. Pet. App. G at 41a. Petitioners also provide advertiser-supported national cable programming services—such as the Cable News Network ("CNN"), the Entertainment and Sports Programing Network ("ESPN"), and the USA Network—which also typically include wine commercials.[3]

The sale and consumption of alcoholic beverages are lawful in Oklahoma. 699 F.2d at 500, Pet. App. A at 19a-20a; Pet. App. G at 42a. The state constitution, however, makes it unlawful "for any person, firm or

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[2] A "superstation" is an independent television station whose signal is relayed via satellite to cable systems beyond the normal reach of its over-the-air signal.

[3] *See* Brief Amicus Curiae of Turner Broadcasting System, Inc. ("Turner Brief") at 3-4. Although the limited record in this case does not include details as to petitioners' carriage of these programming services, there is no dispute that they do carry them. *See* BROADCASTING/CABLECASTING YEARBOOK 1983 at D164-71. In addition, petitioners offer subscribers certain so-called "pay" services, such as Home Box Office (HBO), that at present contain no advertising.

corporation to advertise the sale of alcoholic beverages within the State of Oklahoma, except one sign at the retail outlet bearing the words 'Retail Alcoholic Liquor Store.'" Okla. Const. Art. 27, § 5. An Oklahoma statute makes it unlawful "to advertise any alcoholic beverages or the sale of same within the State" and specifically defines wine as an alcoholic beverage within the scope of the advertising ban. Okla. Stat. Ann. tit. 37, §§ 516, 506(3). The advertising of beer has been permitted. 699 F.2d at 492, 502, Pet. App. A at 3a-4a, 23a.[4]

The ban on advertising of alcoholic beverages has for some years been interpreted by the State to forbid Oklahoma television stations from broadcasting wine commercials contained in national network programming, as well as from locally originating such commercials.[5] At the same time, the Oklahoma Attorney General has construed the ban not to apply to alcoholic beverage advertisements appearing in newspapers, magazines and other publications printed outside Oklahoma, including publications specifically designed for circulation within the State.[6] Out-of-state publications may be delivered to Oklahoma subscribers and sold at outlets within the State even though they contain advertising for wine or other alcoholic beverages. 699 F.2d at 493 n.1, 502, Pet. App. A at 5a n.1, 23a-24a.

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[4] The State's definition of alcoholic beverages includes beer containing more than 3.2 percent alcohol by weight. Okla. Stat. Ann. tit. 37, § 506(3). However, because beer advertising does not usually specify alcoholic content, and some beer contains no more than 3.2 percent alcohol, the advertising of beer generally has been allowed. 699 F.2d at 492, Pet. App. A at 3a-4a.

[5] In upholding this application of the ban, the Oklahoma Supreme Court emphasized that television stations are able to delete wine commercials from network programming. *See Oklahoma Alcoholic Beverage Control Board v. Heublein Wines International*, 566 P.2d 1158, 1160, 1162 (Okla. 1977).

[6] *See, e.g.*, Op. Okla. Att'y Gen. No. 76-348 (Nov. 24, 1976).

Until recently, the State applied a similar policy to cable operators, and they were permitted to carry out-of-state programming containing wine commercials. 699 F.2d at 492, Pet. App. A at 4a; Pet. App. G at 41a. In March 1980, however, the Oklahoma Attorney General issued an opinion stating that retransmission of out-of-state wine commercials by cable systems operating in Oklahoma would be deemed a violation of state law. Op. Okla. Att'y Gen. No. 79-334 (Mar. 19, 1980). Respondent Crisp, director of the Oklahoma Alcoholic Beverage Control Board, notified Oklahoma cable operators, including petitioners, that they faced imminent criminal prosecution if they continued to carry out-of-state wine commercials. 699 F.2d at 492, Pet. App. A at 4a; Pet. App. G at 41a.

Cable television operators are prohibited by federal law from altering or modifying the content of the television signals, including commercials, that they deliver to their subscribers. 699 F.2d at 492, Pet. App. A at 4a; Pet. App. G at 40a. Section 76.55(b) of the Federal Communications Commission's rules, 47 C.F.R. § 76.55 (b) (1982), requires that television programming retransmitted by a cable system "shall be carried in full, without deletion or alteration of any portion." The section has been specifically held to forbid the deletion of commercial messages.[7] In addition, the Copyright Act of 1976 expressly prohibits cable systems operating under the statutory compulsory licensing system from willfully deleting a commercial advertisement from a television signal. 17 U.S.C. §§ 111(b)(3), 111(c)(3) (1982).[8]

Even if deletion of out-of-state wine commercials were lawful, there would be, as the district court found, "no

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[7] *See e.g., Garland B. Pugh*, 68 F.C.C.2d 997, 999 (1978).

[8] The Act contains an exception, not applicable here, for deletion of commercial advertising "by those engaged in television commercial advertising market research." 17 U.S.C. § 111(c)(3) (1982).

feasible way for [petitioners] to block out the advertisements." Pet. App. G at 41a. Petitioners have no control over the programming or advertising included in out-of-state television signals and receive no advance notice from the stations concerning the scheduling of wine commercials. Pet. App. G at 40a; J.A. 24-26, 36-38. Petitioners' reception and retransmission of the television signals occur simultaneously, and, as a practical matter, petitioners would thus be unable to delete each wine commercial in its entirety as it appears. J.A. 25, 30. Even to attempt to delete the major part of each wine commercial would require an extremely burdensome and costly effort to monitor each signal continuously. Pet. App. D at 29a; J.A. 25-26, 30, 36-38.

Although Federal Communications Commission rules do not forbid the deletion of wine commercials from advertiser-supported, satellite-carried programming services such as CNN, deletion of such commercials would violate the terms of the operator's contract with the programmer and would violate the Copyright Act.[9] Moreover, cable operators typically receive no notice from the programming services as to when wine commercials will appear, so deletion of the commercials is technically and economically impracticable for the same reasons as is deletion of the commercials from out-of-state television signals.[10]

For these reasons, if petitioners were forbidden from retransmitting out-of-state wine commercials, they would be compelled to discontinue their carriage of all signals from television stations and national programming services that might contain such commercials. This would deprive Oklahoma residents of access to the programming offered by the Atlanta, Chicago and other "superstа-

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[9] *See* Turner Brief at 6. *See also* 17 U.S.C. §§ 106(2), 111(b) (1982).

[10] *See* Turner Brief at 7.

tions," as well as that provided by other, less distant stations whose signals are available to Oklahoma residents only by means of cable retransmission. Cable operators would also be unable to carry CNN and other advertiser-supported satellite programming services.

Failure to carry out-of-state signals would also place some cable operators in violation of the Commission's "must carry" rules. 47 C.F.R. §§ 76.57-.61 (1982). J.A. 21-22, 34-36. And by precluding the carriage of out-of-state broadcast signals and other advertiser-supported programming, the Oklahoma ban would prevent cable operators from offering much of their most popular programming. J.A. 21-22, 37. As the district court found, this would cause the operators a substantial loss in subscriber revenue, Pet. App. G at 42a, and threaten their economic viability. J.A. 22.

District Court Proceedings

After being warned of possible prosecution if they continued to carry out-of-state wine commercials, petitioners brought an action on March 3, 1981, in the United States District Court for the Western District of Oklahoma against respondent Crisp. J.A. 1. Petitioners sought declaratory and injunctive relief, alleging that the advertising ban as applied to them violated the First and Fourteenth Amendments and was preempted by federal law and actions of the Federal Communications Commission.[11]

Following an evidentiary hearing, the district court on March 6, 1981, granted a preliminary injunction. Pet. App. D. On December 18, 1981, the court entered summary judgment for petitioners and issued a permanent

[11] Petitioners also alleged that enforcement of the advertising ban against them would violate the Commerce Clause and the Equal Protection Clause. Federal jurisdiction was invoked under 28 U.S.C. §§ 1331, 1343, and 2201 (1976 & Supp. V 1981) and 42 U.S.C. § 1983 (1976).

injunction. Pet. App. E, F.[12] A supporting opinion was filed on February 10, 1982. Pet. App. G.

The district court found that the wine commercials carried by petitioners were not false or misleading and did not advocate unlawful activity, Pet. App. G at 47a, and held that they therefore were entitled to First Amendment protection. *Id.* The court ruled that Oklahoma's "blanket suppression," *id.* at 49a, of this advertising violated the First Amendment, relying on decisions of this Court for the proposition that "the State cannot totally prohibit the dissemination of truthful information about a lawful activity." Pet. App. G at 46a.

The court held that the ban failed to satisfy the requirements of *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), because it had been shown to serve only remotely and ineffectively, if at all, the state's asserted interest in curtailing alcohol abuse and alcoholism. *Id.* at 48a.[13] The court also concluded that the ban was invalid under *Central Hudson* because there existed alternative measures, such as labeling requirements, educational programs, or prohibition of the sale or consumption of alcohol, that could combat alcohol abuse more directly and effectively without impinging on First Amendment interests. *Id.* at 42a, 48a-49a.

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[12] On the same date, the district court awarded summary judgment and injunctive relief to a group of Oklahoma broadcast television stations that had brought a separate lawsuit challenging on First Amendment grounds the State's proscription of their broadcasting of wine commercials contained in national network programming. *Oklahoma Telecasters Association v. Crisp*, No. Civ-81-439-W (W.D. Okla. Dec. 18, 1981), *rev'd*, 699 F.2d 490 (10th Cir. 1983).

[13] The court pointed out that enforcement of the ban against petitioners would merely prohibit them "from disseminating advertisements of something the public already knows from experience and from reading [out-of-state] newspaper and magazine advertising—that alcoholic beverages exist and are for sale at certain prices." Pet. App. G at 45a.

The court rejected the contention that Oklahoma's power to regulate alcoholic beverages under the Twenty-first Amendment superseded or relaxed the requirements of the First Amendment. *Id.* at 45a-46a.

In addition, the court found that enforcement of the Oklahoma ban against petitioners would effectively preclude them from carrying any out-of-state television signals that might contain wine commercials, because they are prevented by federal law from deleting the commercials, *id.* at 38a, and because "there exists no feasible way for [them] to block out the advertisements." *Id.* at 41a.[14]

The Decision Below

On appeal, the Tenth Circuit reversed, holding that enforcement of the Oklahoma ban against petitioners did not violate the First Amendment.[15]

The court of appeals agreed that the advertising at issue concerned lawful activity, was not false or misleading, and therefore was "protected speech under the First Amendment." 699 F.2d at 500, Pet. App. A at 20a. The court also acknowledged the absence of any record evidence linking the advertising of alcoholic beverages—particularly wine—to the State's asserted interest in curtailing alcohol abuse or suggesting that the elimination of these commercials would effectively reduce alcohol abuse. 699 F.2d at 501, Pet. App. A at 22a. Nevertheless, the court upheld the ban as being "reasonably related" to the State's interest, based on the con-

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[14] The district court did not reach petitioners' other constitutional claims. Pet. App. G at 39a-40a.

[15] Petitioners' other constitutional claims were not addressed by the court of appeals. 699 F.2d at 493 n.1, Pet. App. A at 5a. At the same time, and in the same opinion, the court also reversed the district court's judgment for the broadcast plaintiffs in *Oklahoma Telecasters Association v. Crisp*, No. 82-1058. The broadcast plaintiffs did not petition for certiorari.

clusion that advertising necessarily encourages consumption. 699 F.2d at 501, Pet. App. A at 22a. The court also found that the ban was "no more extensive than was necessary to serve Oklahoma's asserted interest." 699 F.2d at 502, Pet. App. A at 24a. The court did not discuss the various less restrictive alternatives proposed by the district court and by petitioners.

The court purported to base its decision on the four-part test articulated in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). However, the court held that the *Central Hudson* test should be applied more leniently in this case because of "the additional deference owed to the legislature as a result of the Twenty-first Amendment." 699 F.2d at 501, Pet. App. A at 22a. The court also concluded that its decision was "mandate[d]," 699 F.2d at 502, Pet. App. A at 24a, by this Court's summary dismissal of the appeal in *Queensgate Investment Co. v. Liquor Control Commission*, 103 S. Ct. 31 (1982), which left undisturbed a decision by the Ohio Supreme Court upholding that state's restrictions on off-premises price advertising by liquor licensees.

The Tenth Circuit noted that cable operators were precluded by federal law from deleting wine commercials from the television signals they carry, 699 F.2d at 492, Pet. App. A at 4a, and that they "especially are placed in a difficult position" by the Oklahoma ban. 699 F.2d at 502, Pet. App. A at 23a. The court did not, however, address the First Amendment implications of the ban's effective prohibition of the carriage of out-of-state advertiser-supported programming. Nor did the court indicate how cable programming could be distinguished from magazines and newspapers, which may be distributed in Oklahoma even though they contain alcoholic beverage advertising.

On March 21, 1983, the Tenth Circuit denied a petition for rehearing and refused petitioners' request that

it clarify its ruling to preserve for later adjudication petitioners' preemption claims and other constitutional issues not addressed in the court's opinion. Pet. App. B. The court stayed its mandate on April 4, 1983. Pet. App. C.

A writ of certiorari was granted by this Court on October 3, 1983. J.A. 43. In addition to the First Amendment issues raised by petitioners, this Court directed the parties to address the question whether the Oklahoma ban, as applied to cable operators' carriage of out-of-state signals, had been preempted by existing federal regulation.

SUMMARY OF ARGUMENT

Oklahoma's ban on the advertising of alcoholic beverages is an unconstitutional infringement of protected commercial speech. This Court has made clear that such a blanket, content-based ban on truthful advertising about a lawful product violates the First Amendment. In addition, the ban cannot survive the test set out in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), because the State has not demonstrated a direct and substantial link between alcoholic beverage advertising—in particular, wine commercials—and its asserted interest in curtailing alcoholism and alcohol abuse. The State has also failed to show that it could not promote its interest in alternative ways less destructive of First Amendment rights. Contrary to the holding by the court below, the Twenty-first Amendment does not ease the First Amendment standards applicable here.

Beyond its impact on commercial speech, the Oklahoma ban is also invalid under the First Amendment because it substantially limits noncommercial speech in the form of news and entertainment programming that cable operators transmit to their subscribers. Cable operators are legally and technically unable to delete wine commercials that appear in the television signals and advertiser-supported cable programming services they carry. By

forbidding cable operators from transmitting wine commercials, the Oklahoma ban effectively prevents them from carrying any advertiser-supported out-of-state programming that might include such commercials. The ban thus restricts impermissibly the editorial choices of cable operators and the interstate flow of information and ideas.

The Oklahoma ban is also preempted by federal law and policies. First, it conflicts with federal regulations that require cable operators to carry certain out-of-state television signals without deletion or alteration. Second, it intrudes into an area—cable signal carriage—specifically preempted by the Federal Communications Commission. Finally, it conflicts with important federal policies reflected in the Communications Act and Copyright Act and frustrates the congressional and agency desire to promote cable carriage of distant television signals and national cable programming services.

ARGUMENT

I. OKLAHOMA'S BLANKET BAN ON TRUTHFUL ADVERTISING OF A LAWFUL PRODUCT VIOLATES THE FIRST AMENDMENT.

In a series of decisions over the past decade, this Court has made clear that truthful commercial speech about a lawful product or activity is protected by the First Amendment and has repeatedly invalidated government efforts to suppress such speech. Oklahoma's blanket ban on the truthful advertising of lawful alcoholic beverages, for the express purpose of diminishing public knowledge about the products, violates the First Amendment. The Twenty-first Amendment does not justify or support this abridgment of protected commercial speech.

A. The First Amendment Forbids States From Enacting Blanket, Content-Based Bans on Truthful Advertising of a Lawful Product.

Decisions of this Court at one time suggested that commercial speech was outside the scope of the First Amend-

ment.[16] Beginning with *Bigelow v. Virginia*, 421 U.S. 809 (1975), however, the Court has established that commercial speech—including product advertising—promotes important First Amendment values and is entitled to substantial constitutional protection.

By informing consumers of the availability, nature, and price of products, commercial speech fulfills an "indispensable" role in the allocation of resources and in the structuring and functioning of our economy. *Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1977).[17] This Court has accordingly rejected the "highly paternalistic" view that government may attempt to shield citizens from perceived problems connected with legally available products and services by forbidding truthful, non-misleading advertising about them. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976). Rather, it has held that the First Amendment compels government

> to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them . . . . It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.

Id. The Court has upheld prohibitions of advertising that is false or misleading or that promotes an unlawful product[18] and has indicated that certain narrow restric-

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[16] *See, e.g., Valentine v. Chrestensen*, 316 U.S. 52 (1942).

[17] *See also Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 561 (1980); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 764-65 (1976).

[18] *See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982); *Friedman v. Rogers*, 440 U.S. 1 (1979); *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978).

tions—such as content-neutral time, place and manner regulations—may be constitutional as to commercial speech when they would be invalid as to noncommercial speech.[19] However, since it recognized that the First Amendment protects commercial speech, the Court "has not approved a blanket ban on commercial speech unless the expression itself was flawed in some way, either because it was deceptive or related to unlawful activity." *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 566 n.9 (1980).

Thus, the Court held in *Carey v. Population Services International*, 431 U.S. 678 (1977), that a state could not prohibit the advertising of contraceptives, despite the state's assertions that the restriction was necessary to protect the public from potentially offensive materials and to discourage unlawful sexual activity. The Court declared that "a State may not 'completely suppress the dissemination of concededly truthful information'" about a lawful product.[20] The Court has similarly invalidated state bans on advertising by lawyers, *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); on the advertising of abortion services, *Bigelow v. Virginia*, 421 U.S. 809 (1975), and on price advertising by pharmacists. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

It has been suggested that this Court in *Central Hudson* somehow relaxed its earlier strict stance concerning content-based blanket bans on protected commercial speech.[21] It is true that *Central Hudson* set up a four-

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[19] *See, e.g., Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 503-12 (1981); *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. at 564-66; *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. at 771.

[20] 431 U.S. at 700 (quoting *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. at 773).

[21] *See Central Hudson*, 447 U.S. at 573-79 (Blackmun, J., concurring).

part test, discussed in the following section, for analyzing commercial speech restrictions. However, the Court did not purport in *Central Hudson* to alter its position on blanket bans. To the contrary, the Court endorsed the reasoning of prior decisions[22] and specifically noted its continuing resistance to such blanket bans.[23] The Court's subsequent opinion in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 505 (1981), expressly reaffirmed that:

> A State may not completely suppress the dissemination of truthful information about an entirely lawful activity merely because it is fearful of that information's effect upon its disseminators and its recipients.

Oklahoma's ban on the advertising of alcoholic beverages is precisely the sort of blanket ban on commercial speech repeatedly condemned by this Court.

As both courts below found, the wine commercials at issue here are truthful and not misleading. 699 F.2d at 499 n.7, 500, Pet. App. A at 18a n.7, 20a; Pet. App. G at 47a. The Oklahoma ban is neither limited to nor directed at speech which is false or misleading, but instead sweeps broadly to encompass all alcoholic beverage advertising. 699 F.2d at 500 n.8, Pet. App. A at 20a n.8; Pet. App. G at 47a. It is also clear that the ban does not involve a product or activity that is unlawful in Oklahoma; the State permits the sale and consumption of alcoholic beverages. 699 F.2d at 500, Pet. App. A at 19a-20a; Pet. App. G at 42a. The commercials do not depict or propose illegal conduct and cannot "even remotely be characterized as 'directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action.'" *Carey v. Population Services International*, 431 U.S. at 701 (quoting *Brandenburg v. Ohio*, 395 U.S.

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[22] *Id.* at 566. *See also In re R.M.J.*, 455 U.S. 191 (1982).

[23] 447 U.S. at 566 n.9.

444, 447 (1969)).[24] The possibility that individuals might use alcoholic products unlawfully does not justify a sweeping ban on alcoholic beverage advertising, just as the potential misuse of prescription drugs did not justify the advertising restrictions struck down in *Virginia State Board of Pharmacy*, 425 U.S. at 766-68.[25]

As the district court found, the ban is plainly a content-based "blanket suppression" of advertising about wine and other alcoholic beverages. Pet. App. G at 49a. While the Tenth Circuit asserted that the ban does not entirely eliminate the dissemination of information about these products because "[o]n-premises advertising is allowed," 699 F.2d at 502, Pet. App. A at 23a, this view limited exception hardly prevents the restrictions from being the kind of blanket ban condemned by this Court's decisions. The on-premises advertising permitted by Oklahoma consists of a single sign at the retail outlet identifying it as a "Retail Alcoholic Liquor Store" in letters no more than four inches high. 37 Okla. Stat. Ann. § 516. The exception thus plainly does not allow any actual advertising at all, but only a limited on-premises identification of retail outlets. As the Court said in *Virginia State Board of Pharmacy* about a similarly narrow exception to a ban on drug price advertising, "[i]t is clear, nonetheless, that all advertising . . ., in the normal sense, is forbidden." 425 U.S. at 752.[26]

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[24] *Compare Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. at 489 (1982) (sustaining ordinance "expressly directed at commercial activity promoting or encouraging illegal drug use").

[25] *See also Carey v. Population Services International*, 431 U.S. at 701 (possibility that contraceptive advertisements might encourage some to engage in unlawful sexual activity does not justify complete ban on advertising of the product).

[26] The restrictions at issue in *Virginia State Board of Pharmacy* permitted pharmacists to quote prescription drug prices over the telephone. 425 U.S. at 752. Another exception to the Oklahoma ban relied on here by the Tenth Circuit was the State's decision not

Oklahoma's attempt to enforce the ban against cable operators raises particularly important constitutional concerns, since, as this Court held in *Bigelow v. Virginia*, 421 U.S. at 828, a ban on advertising "incur[s] more serious First Amendment overtones" when, as here, it is enforced against the press. In that case, Virginia sought to enforce a ban on the advertising of abortion services against a Virginia newspaper editor who had published an advertisement placed by a New York abortion service. The Court reversed the editor's conviction, holding that the state's "interest in shielding its citizens from information about activities outside [its] borders . . ., even if understandable, was entitled to little, if any, weight." *Id.* at 827-28.

Here, the state of Oklahoma similarly attempts to shield its citizens from commercial speech originating outside the State by acting against the press. Such a sweeping attempt to enforce "protection . . . based on ignorance" cannot be squared with the First Amendment.[27]

B. The State Ban on Alcoholic Beverage Advertising Violates the *Central Hudson* Test.

We have demonstrated above that Oklahoma's blanket ban is so plainly invalid under decisions of this Court that it is unnecessary to subject it to specific scrutiny under the four-part *Central Hudson* test. If considered un-

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to prohibit the sale or distribution within Oklahoma of out-of-state publications containing alcoholic beverage advertising. 699 F.2d at 502, Pet. App. A at 23a. This does not, however, make the restrictions any less of a "blanket ban"—or any more constitutional—under the decisions of this Court. In none of the cases in which this Court has struck down a state restriction on commercial speech as a "total" or "blanket" ban did the State apparently attempt to forbid the distribution of out-of-state publications. *See, e.g., Bates v. State Bar of Arizona*, 433 U.S. at 383; *Carey v. Population Services International*, 431 U.S. at 702; *Virginia State Board of Pharmacy*, 425 U.S. at 771.

[27] *Id.* at 769.

der that test, however, the ban still must fail. The test was described in *Central Hudson* as follows:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.[28]

The commercial speech at issue here is clearly protected under the first part of the *Central Hudson* test since it concerns lawful activity and is not false or misleading. As for the second part of the test, the interest asserted by the State in support of its advertising ban is the curtailment of alcoholism and alcohol abuse.[29] Petitioner does not dispute that this is a substantial and important interest.[30] But *Central Hudson* and other decisions of this Court have made clear that invocation of a substantial state interest does not in itself justify an infringement of protected commercial speech.[31] The State

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[28] 447 U.S. at 566. *See also Bolger v. Youngs Drug Products Corp.*, 103 S. Ct. 2875, 2881 (1983); *In re R.M.J.*, 102 S. Ct. at 937.

[29] 699 F.2d at 498, Pet. App. A at 20a.

[30] While petitioner agrees that the State has a substantial interest in limiting alcoholism and alcohol abuse, it does not agree that the State has a substantial interest in curtailing advertising about wine or other alcoholic beverages. *See* discussion below. Any interest that the State may have in prohibiting alcoholic beverage advertising is substantially diminished by the exceptions it has created for out-of-state print publications and for beer advertising. As this Court observed in *Metromedia, Inc. v. San Diego*, 453 U.S. at 520-21, "exceptions to the general prohibition are of great significance in assessing the strength of the [government's] interest."

[31] *See, e.g., Central Hudson*, 447 U.S. at 571 (ban on promotional advertising by electric utilities struck down despite "imperative"

must still satisfy the third and fourth parts of the *Central Hudson* test, something Oklahoma has not done.

The third part of the *Central Hudson* test requires that the State demonstrate a direct and substantial link between its asserted interest and the restriction on commercial speech. As conceded by the Tenth Circuit, the record here contains no evidence that the advertising of wine or other alcoholic beverages contributes to alcohol abuse or that the suppression of such advertising would significantly reduce alcohol abuse. 699 F.2d at 501, Pet. App. A at 22a. On the record before it, the district court specifically found the advertising ban served the State's interest only remotely and ineffectively, if at all. Pet. App. G at 48a.

Despite the lack of record evidence, the Tenth Circuit upheld the ban on the ground that it was not "unreasonable" for Oklahoma to "believe" that advertising of alcoholic beverages necessarily increased their consumption. 699 F.2d at 501, Pet. App. A at 22a.[32] The court supported this finding by asserting that "[t]he entire economy of the industries that bring these challenges is based on the belief that advertising increases sales." 699 F.2d

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national interest in energy conservation); *Linmark Associates v. Township of Willingboro*, 431 U.S. 85, 94 (1977) ("vital goal" of racial integration does not justify ban on "For Sale" signs); *Virginia State Board of Pharmacy*, 425 U.S. at 766 (ban on pharmacists' price advertising invalidated despite "strong interest" in maintaining standards of profession). *See also Bates v. State Bar of Arizona*, 433 U.S. at 368-79.

[32] The Tenth Circuit relied on this Court's decision in *Metromedia* for the proposition that the nexus between the regulation and the asserted state interest need only meet the deferential scrutiny of a "rational relationship" test. 699 F.2d at 501. This reliance was misplaced. The restriction on commercial speech at issue in *Metromedia* was content-neutral and limited a single medium of speech (billboards) in order to pursue purposes not related to speech. In contrast, the restrictions in question here are directed at speech of a particular content and seek to suppress that speech in all Oklahoma media because of the effect the information might have on the public.

at 501, Pet. App. A at 22a. However, the fact that manufacturers and distributors of alcoholic beverages advertise does not in itself demonstrate that such advertising increases overall consumption. It may be logical to assume, as this Court did in *Central Hudson*, that advertising in a monopoly situation necessarily is designed to increase overall consumption. 447 U.S. at 569. But significant competition exists among various brands and varieties of alcoholic beverages, and there is substantial evidence that alcoholic beverage advertising serves principally to influence market shares.[33] There is no evidence here that eliminating advertising significantly reduces consumption; indeed, the district court noted that the consumption of alcoholic beverages in Oklahoma had increased substantially since enactment of the ban. Pet. App. G at 42a.

Even if the advertising of wine did serve to increase wine consumption, this would not necessarily show that it increased the incidence of alcoholism or alcohol abuse. Recent studies have concluded that "no scientific evidence exists that beverage alcohol advertising has any significant impact on the rate of alcohol abuse and alcoholism in America society."[34] To the extent the wine commer-

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[33] The founding director of the National Institute on Alcohol Abuse and Alcoholism has stated that advertising "does not, for the most part, cause people to engage in drinking alcoholic beverages . . . But advertising can be effective in causing those who are already drinking to switch brands. . . . A ban on alcohol advertising may in fact further add to the 'forbidden fruit' aspect of alcohol (particularly among the young) . . ." M. Chafetz, *Ban on liquor ads is no cure for alcoholism*, ADVERTISING AGE, July 7, 1975, at 15. *See also* H. LEVENTHAL, *An Analysis of the Influence of Alcoholic Beverage Advertising on Drinking Customs*, in ALCOHOL EDUCATION FOR CLASSROOM AND COMMUNITY (R. McCarthy ed. 1964); R. Smart and R. E. Cutler, *The Alcohol Advertising Ban in British Columbia: Problems and Effects on Beverage Consumption*, 71 BRIT. J. OF ADDICTION 13 (March 1976).

[34] D. PITTMAN, PRIMARY PREVENTION OF ALCOHOL ABUSE AND ALCOHOLISM: AN EVALUATION OF THE CONTROL OF CONSUMPTION

cials present an alternative to hard liquor and spirits, they may indeed encourage moderation in the consumption of alcohol.[35]

There is substantial doubt whether a ban on out-of-state advertising on cable television would effectively diminish the consumption of alcohol in any event. As the district court below found, the ban cannot effectively insulate Oklahoma's citizens from information about the availability and variety of alcoholic beverages, since such information is widely known and continues to enter Oklahoma in ways the state has not regulated.[36]

Restrictions on commercial speech with such a "speculative" and "tenuous" relationship to the State's asserted interest cannot be reconciled with the First Amendment.[37] In *Linmark Associates, Inc. v. Township of Willingboro*, for example, the Court acknowledged that it was "plausi-

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POLICY 18 (Social Science Institute of Washington University 1980). *See also* R. WILKINSON, THE PREVENTION OF DRINKING PROBLEMS 43-48, 132, 157 (1970).

[35] *See* C. Burck, *Changing Habits in American Drinking*, FORTUNE, Oct. 1976, at 156, 159-60. Current medical evidence suggests that moderate consumption of alcoholic beverages, particularly of wine, may provide important health benefits. *See, e.g.*, Washington Post, Nov. 12, 1981, at E22, Col. 1 ("Doctors have concluded from a 10-year study that persons who consume two or fewer drinks of wine or other alcoholic beverages daily appear to live longer than persons who abstain from drinking entirely"). *See also* Washington Post, June 6, 1982, Mag., at 27; N.Y. Times, Aug. 4, 1981, at A13, col. 1; U.S. NEWS & WORLD REP., Mar. 30, 1981, at 74; NEWSWEEK, Aug. 17, 1981, at 77.

[36] Pet. App. G at 45a, 48a. As noted by the court, liquor advertisements enter Oklahoma in newspapers and periodicals originating outside the state, and wine commercials on certain out-of-state radio and television broadcasts may be received by Oklahoma citizens over the air.

[37] *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. at 569.

ble" that the community's ban on "For Sale" signs would reduce panic selling by whites and promote the community's interest in racially integrated housing, 431 U.S. at 96 n.10, but refused to find a sufficiently direct nexus between the ban and the State's interest because no causal relationship had been demonstrated in the record and because there were other, equally plausible interpretations of the ban's effect and of the reasons for whites' departure. *Id.* at 95-96. Similarly, in *Bolger v. Youngs Drug Products Corp.*, 103 S. Ct. 2875, 2884 (1983), the Court invalidated a federal ban on the mailing of contraceptive advertisements because only a "marginal" and "incremental" relationship had been shown between the ban and the state's asserted interest in promoting parents' control over reading materials.[38]

The Oklahoma ban also fails to satisfy the fourth part of the *Central Hudson* test, which requires the State to establish that the suppression of speech "is no more extensive than necessary to further the State's interest." 447 U.S. at 569-70. As in *Central Hudson*, no showing has been made that "a more limited restriction . . . would not serve adequately the State's interests." *Id.* at 570. The alternatives available to the State here are numerous. Here, unlike *Central Hudson*, where prohibition of the activity in question—the consumption of energy—was obviously infeasible, Oklahoma could attempt to solve problems perceived to result from the consumption of alcohol by banning the sale and consumption of alcoholic beverages in the State, as it has done in the past. Pet. App. G at 42a. This alternative, which does not affect speech at all, is constitutionally preferable to a ban on speech. *See Virginia State Board of Pharmacy*, 425 U.S. at 770.

Short of this, the State still has available to it many alternatives. It can strictly regulate the times, places,

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[38] *See also Bates v. State Bar of Arizona*, 433 U.S. at 375-79; *Virginia State Board of Pharmacy*, 425 U.S. at 766-70.

and circumstances in which alcoholic beverages may be dispensed. If it demonstrates that particular advertising encourages excessive consumption of alcoholic beverages, it can prohibit that advertising, as the Court suggested in *Central Hudson*. 447 U.S. at 570. The district court noted other possible alternatives, including labeling requirements and educational programs designed to inform citizens of the dangers of alcohol abuse. Pet App. G at 48a-49a. As observed by the district court, such measures would combat alcohol-related problems more directly than an advertising ban and in a manner far more compatible with First Amendment principles—by increasing information available to the public, rather than diminishing it.[39]

C. The Twenty-first Amendment Does Not Justify the State's Advertising Ban.

The Tenth Circuit rested its decision below largely on its erroneous conclusion that the Oklahoma ban was entitled to "additional deference . . . as a result of the Twenty-first Amendment." 699 F.2d at 501, Pet. App. A at 22a.

In interpreting the Twenty-first Amendment, this Court has focused on the Amendment's express language and history.[40] The Amendment, adopted in 1933, has two substantive sections. Section 1 repealed the Eighteenth Amendment. Section 2 granted power to the states to control the shipment of alcoholic beverages into their territory:

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[39] Pet. App. G at 49a. *See In re R.M.J.*, 102 S. Ct. at 939; *Linmark Associates, v. Township of Willingboro*, 431 U.S. at 97; *Virginia State Board of Pharmacy*, 425 U.S. at 769-70. *Cf. Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("[T]he remedy to be applied is more speech, not enforced silence").

[40] *See, e.g., California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 107 (1980); *Craig v. Boren*, 429 U.S. 190, 205-06 (1976).

> The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

The history of the Amendment shows that Section 2 was designed to elevate to constitutional status the Webb-Kenyon Act, which had been enacted before passage of the Eighteenth Amendment and which allowed states to prohibit or regulate the importation of alcoholic beverages.[41] Although the Webb-Kenyon Act had been upheld by a divided Supreme Court before national prohibition,[42] doubts remained whether the Court might on reconsideration hold that the law imposed an impermissible burden on interstate commerce, in violation of the Commerce Clause.[43] Representatives of the "dry" states also worried that Congress might at some later date modify or repeal the Act.[44] Section 2 was therefore designed "to assure the so-called dry States against the importation of intoxicating liquor into those States . . . [by] writ[ing] permanently into the Constitution a prohibition along that line . . ." [45]

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[41] Act of Mar. 1, 1913, Ch. 90, 37 Stat. 699, 27 U.S.C. § 122 (1976), *reenacted*, Ch. 740, § 202(b), 49 Stat. 877 (1935).

[42] *Clark Distilling Co. v. Western Maryland Railway*, 242 U.S. 311 (1917).

[43] Thus, Senator Borah observed that without passage of Section 2 Congress would be "turning the dry states over for protection to a law which is still of doubtful constitutionality and which, as it was upheld by a divided court, might very well be held unconstitutional upon a re-presentation of it." 76 CONG. REC. 4170, 4172 (1933). *See also id.* at 4141 (remarks of Sen. Blaine).

[44] *Id.* at 4170 (remarks of Sen. Borah).

[45] 76 CONG. REC. 4141 (1933) (remarks of Sen. Blaine, reporting the views of the Senate Judiciary Committee). *See also id.* at 4228 (remarks of Sen. Bingham); *id.* at 4171 (remarks of Sen. Wagner); *id.* at 4172 (remarks of Sen. Lewis).

The Twenty-first Amendment was thus "intended to free the State of 'traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders.'" *United States v. State Tax Commission*, 412 U.S. 363, 375 (1973).[46] The Amendment has accordingly been held to give states wide latitude to regulate the transportation and distribution of alcoholic beverages in ways that would otherwise violate the Commerce Clause.[47] Included in this is the power to prohibit the consumption or manufacture of alcoholic beverages within the state.[48] Even in the Commerce Clause context, however, the Court has rejected the notion "'that the Twenty-first Amendment has somehow operated to "repeal" the Commerce Clause wherever regulation of intoxicating liquors is concerned.'"[49]

When state regulations on alcoholic beverages conflict with constitutional provisions other than the Commerce Clause, the Amendment has generally been held to have little or no significance. As the Court observed in *Craig v. Boren*, 429 U.S. 190, 206 (1976):

> [T]he Amendment primarily created an exception to the normal operation of the Commerce Clause . . . Once passing beyond the consideration of the Commerce Clause, the relevance of the Twenty-first Amendment becomes increasingly doubtful.

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[46] Quoting *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 330 (1964).

[47] *See, e.g., Joseph F. Finch & Co. v. McKittrick*, 305 U.S. 395, 398 (1939) (upholding retaliatory prohibition of liquor imports from certain states); *State Board of Equalization v. Young's Market Co.*, 299 U.S. 59 (1936) (upholding import fees).

[48] *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138-39 (1939).

[49] *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. at 109 (quoting *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. at 331-32).

For example, in *Department of Revenues v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964), the Court held that the Twenty-first Amendment does not permit a state to tax imported liquor in violation of the Constitution's Export-Import Clause.[50] The significance of the Twenty-first Amendment is particularly circumscribed when individual civil rights are at stake, since "'[n]either the text nor the history of the Twenty-first Amendment suggests that it qualifies individual rights protected by the Bill of Rights and the Fourteenth Amendment where the sale or use of liquor is concerned.'" *Craig v. Boren*, 429 U.S. at 206.[51]

Thus, in *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), the Court held that a state could not authorize the posting of notes in liquor stores identifying certain persons as alcoholics or public hazards without providing due process. The Twenty-first Amendment, the Court held, neither justified the "posting" statute nor relaxed normal due process requirements. Similarly, in *Larkin v. Grendel's Den, Inc.*, 103 S. Ct. 505 (1982), the Court struck down a state law that gave religious organizations the power to veto liquor license applications for adjoining property. The Court rejected the suggestion that the Twenty-first Amendment compelled a more deferential standard of review, holding instead that "[t]he State may not exercise its power under the 21st Amendment in a way which impinges upon the Establishment Clause of the First Amendment." *Id.* at 4027 n.5. And in *Craig v. Boren*, 429 U.S. at 209, the Court overturned an Oklahoma statute that established different drinking ages for males and females and declared that "the operation

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[50] *See also United States v. State Tax Commission*, 412 U.S. 363 (1973) (state cannot regulate delivery of alcoholic beverages to military bases in light of constitutional grant of exclusive jurisdiction to Congress).

[51] P. BREST, PROCESSES OF CONSTITUTIONAL DECISION-MAKING, CASES AND MATERIALS 258 (1978).

of the Twenty-first Amendment does not alter the application of equal protection standards that otherwise govern this case." [52]

These decisions demonstrate that the Twenty-first Amendment does not ease the First Amendment standards otherwise applicable to Oklahoma's ban. The decisions in *New York State Liquor Authority v. Bellanca*, 452 U.S. 714 (1981), and *California v. LaRue*, 409 U.S. 109 (1972)—relied on by the court below, 699 F.2d at 498, Pet. App. A at 169-170—are not to the contrary. In those cases, the Court held that states could forbid sexual performances or topless dancing in establishments licensed to sell alcoholic beverages. Both decisions turned on "[t]he critical fact . . . that [the State] has not forbidden these performances across the board [but] has merely proscribed [them in] establishments that it licenses to sell liquor by the drink." *California v. LaRue*, 409 U.S. at 118.[53] The decisions thus merely permitted states to limit activities in places that serve alcoholic beverages "as part of [the states'] liquor license program[s]." *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 933 (1975). Oklahoma's advertising ban, in contrast, is not limited to activity within liquor-licensed establishments, nor is it imposed as a condition on the manner or circumstances in which liquor may be dispensed.[54]

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[52] *See also Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 178-79 (1972) (state liquor regulation cannot promote or enforce racial discrimination in violation of Equal Protection Clause).

[53] *See also New York State Liquor Authority v. Bellanca*, 452 U.S. at 716 ("As in *LaRue*, the statute's prohibition applies only to establishments which are licensed by the State to serve liquor").

[54] *Bellanca* and *LaRue* are also distinguishable from the present case in that both involved restrictions on conduct, rather than speech. *See California v. LaRue*, 409 U.S. at 118 (the prohibited performances "partake more of gross sexuality than of communication"); *Craig v. Boren*, 429 U.S. at 207 (distinguishing *LaRue*). As discussed above, the truthful advertising banned by Oklahoma is protected speech.

Similar considerations distinguish this case from *Queensgate Investment Co. v. Liquor Control Commission*, 103 S. Ct. 31 (1982), a summary dismissal of appeal which the Tenth Circuit viewed as "mandat[ing]" its decision here. 699 F.2d at 502, Pet. App. A at 24a. The regulation in *Queensgate* prohibited liquor license holders from advertising prices per drink or price advantages.[55] The regulation was unsuccessfully challenged in state court by a liquor licensee on First Amendment and other grounds; the appeal was dismissed by this Court for want of a substantial federal question. Like *Bellanca* and *LaRue*, *Queensgate* involved only a restriction on liquor licensees. Here, in contrast, Oklahoma seeks to enforce its ban against cable operators, who do not sell liquor and are not licensed to do so. Whatever special authority the State may have to prohibit advertising by liquor licensees is not applicable here.[56]

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[55] *See Queensgate Investment Co. v. Liquor Control Commission*, 433 N.E.2d 138, 139 n.1 (Ohio 1982), *app. dismissed*, 103 S. Ct. 31 (1982).

[56] The advertising regulations upheld in *Queensgate* are also distinguishable from the Oklahoma ban in that they were far more limited in scope, forbidding only certain persons from advertising certain types of information about alcoholic beverages and leaving open substantial avenues for other forms of advertising about the product. The Tenth Circuit itself recognized that Oklahoma's sweeping ban on the advertising of alcoholic beverages is "indeed broader than the regulation in *Queensgate*." 699 F.2d at 497, Pet. App. A at 15a. This Court has emphasized that to the extent that a summary disposition has any precedential value, it should be narrowly interpreted to extend only to "the precise issues presented and necessarily decided . . . . [and] should not be understood as breaking new ground." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977).

II. BY PREVENTING CABLE OPERATORS FROM TRANSMITTING ADVERTISER-SUPPORTED OUT-OF-STATE PROGRAMMING, THE STATE BAN RESTRICTS NONCOMMERCIAL SPEECH IN VIOLATION OF THE FIRST AMENDMENT.

As applied to Oklahoma cable television operators, the ban's impact goes well beyond the suppression of wine commercials themselves. Because of the nature of the cable industry and the federal regulatory system under which it operates, the prohibition of wine commercials would effectively prevent Oklahoma cable operators from disseminating any out-of-state programming—including news, documentaries, sports, entertainment, and various other services—that might contain wine commercials. Even if Oklahoma's ban on the advertising of alcoholic beverages were not unconstitutional as an infringement of protected commercial speech, the First Amendment cannot countenance the regulation's substantial interference with the dissemination of noncommercial speech.[57]

A. The Oklahoma Ban Effectively Prevents Cable Operators From Offering Advertiser-Supported Programming From Outside the State.

As discussed above, cable television operators are prevented by federal law from eliminating commercials from out-of-state television signals. The Federal Communications Commission specifically forbids cable operators from deleting commercials or making any other alterations in the television signals they disseminate, 47 C.F.R. § 76.55(b) (1982), and the Copyright Act of 1976 forbids cable operators from deleting or altering advertise-

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[57] The fact that this news and entertainment programming contains advertising does not render it "commercial speech" for purposes of First Amendment analysis. *See Bolger v. Youngs Drug Products Corp.*, 103 S. Ct. at 2880; *New York Times Co. v. Sullivan*, 376 U.S. 254, 265-66 (1964).

ments contained in television signals which they transmit pursuant to the "must carry" rules or under compulsory copyright licensing. 17 U.S.C. §§ 111(b)(3), 111(c)(3) (1982).[58]

Even if it were lawful, it would be technically impossible to eliminate the commercials completely and instantaneously. Operators have no way of knowing when wine commercials will appear—they receive no advance notice of wine commercials from the television stations whose signals they distribute, and the signals themselves include no visual or audio cues to forthcoming wine commercials. Pet. App. G. at 40a.[59] In these circumstances, as the district court found, even to attempt to comply with the advertising ban would impose an "enormous financial burden" on cable operators. Pet. App. D at 29a. Deletions of the wine commercials and substitution of other material would require expensive switching equipment and individual monitoring throughout the broadcast day of each signal on which a wine commercial might appear. Cable operators testified below, without contradiction, that such procedures would be extremely costly and impractical. J.A. 23-26, 29-30, 36-38.[60]

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[58] Congress established the compulsory licensing scheme because it determined that cable operators could not feasibly attempt to obtain individual copyright agreements from the copyright owner of each program carried on each signal. H.R. Rep. No. 1476, 94th Cong., 2d Sess. 89 (1976).

[59] It was this problem that led the Federal Communications Commission to reject a proposed rule requiring cable operators to delete commercials in certain circumstances; such a rule would be infeasible, the Commission found, because cable operators would be unable to secure the "close cooperation" of broadcasters necessary to enable the deletions to be made. *Cable Television Report and Order*, 36 F.C.C.2d 143, 165 (1972), *aff'd sub nom. ACLU v. FCC*, 523 F.2d 1344 (9th Cir. 1975).

[60] The great cost of such measures is suggested in comments filed when the Federal Communications Commission was considering a proposal to require commercial substitution by cable operators. *Cable Television Report and Order*, 36 F.C.C.2d at 154-55. The National Association of Broadcasters, for example, projected equip-

In addition, although the Commission does not forbid cable operators from deleting commercials from satellite-carried programming services such as CNN and ESPN, operators could not make such deletions for the same technical and economic reasons as make it impossible for them to delete commercials from television station signals. Cable operators typically receive no notice from cable programming services regarding the placement of wine commercials and would be forced to employ costly equipment and staffing in order to attempt the deletions.[61]

Thus, the district court correctly found that "[t]here exists no feasible way for [petitioners] to block out the advertisements." Pet. App. G at 41a. If they are to obey state law, cable operators' only alternative is to refrain from transmitting any programming that might include wine commercials. The court of appeals did not disturb the district court's finding; indeed, the court noted that cable operators "especially are placed in a difficult position" by the State's advertising ban. 699 F.2d at 502, Pet. App. A at 23a. Nevertheless, the court analyzed the ban as if it affected only commercial advertisements and ignored the ban's substantial restriction of protected non-commercial speech.[62]

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ment costs of $140,000 for a system that would allow a cable operator to make deletions and substitutions in four broadcast signals. *Id.* at 155. The National Cable Television Association estimated that it would cost $27,000 for equipment and $90,000 in annual operating expenses for a cable operator to make deletions and substitutions in three signals. *Id.*

[61] Turner Brief at 7. Such deletion would also violate the terms of the operator's contract with the programmer and constitute infringement of the programmer's copyright. *Id.* at 6.

[62] This case is distinguishable on this basis from *Dunagin v. City of Oxford*, No. 80-3762 (5th Cir. Oct. 31, 1983) (en banc), in which a divided Fifth Circuit upheld the constitutionality of Mississippi's ban on alcoholic beverage advertising. In reaching its decision, the Fifth Circuit emphasized that Mississippi had not attempted to apply the ban to advertisements originating outside the state, including those contained in out-of-state signals transmitted by Mis-

B. In Restrciting Noncommercial Speech, the Oklahoma Ban Violates the First Amendment.

There can be no doubt that cable television—like newspapers and broadcast television and radio—is today "a significant medium for the communication of ideas . . . included within the free speech and free press guaranty of the First and Fourteenth Amendments." [63] While cable once served primarily as a means of bringing local television signals to low-lying neighborhoods and other areas with poor reception,[64] it now offers subscribers a wide range of programming from a variety of sources. Using microwave relays and communications satellites, cable operators can transmit to their subscribers signals from distant television stations, including "superstations" in Atlanta, Chicago and elsewhere, and national programming services such as CNN and ESPN. More than five thousand cable systems now serve over 30 million American households, transmitting an array of news, sports, and entertainment programming of diverse formats and content.[65] The rapid expansion of the industry over the last decade, coupled with the development of numerous programming services, has gone far toward fulfilling what this Court has recognized as cable's "'great potential . . . [for] augmenting the public's choice of programs and types of services.'" [66]

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sissippi cable systems. The Fifth Circuit observed that it was "exceedingly unlikely" that the state could ban wine commercials in cable signals originating in other states "in the face of the Commerce Clause, the Supremacy Clause and the First Amendment." Slip op. at 487 (West page proofs).

[63] *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952).

[64] *See Fortnightly Corp. v. United Artists Television*, 392 U.S. 390 (1968).

[65] BROADCASTING/CABLECASTING YEARBOOK 1983 at D3.

[66] *United States v. Midwest Video Corp.*, 406 U.S. 649, 654 (1972) (quoting *First Report and Order*, 20 F.C.C.2d 201, 202 (1969)). *See also Malrite T.V. of New York v. FCC*, 652 F.2d 1140, 1143 (2d Cir. 1981), *cert. denied*, 102 S. Ct. 1002 (1982).

In determining what signals and services to include in their cable transmissions, cable operators exercise a substantial and important editorial function. Various courts have held that the First Amendment protects cable operators' editorial choice in programming.[67] While this Court has not expressly considered the First Amendment protection to be accorded cable operators, it recognized in *FCC v. Midwest Video Corp.*, 440 U.S. 689, 707 (1979), that cable operators have "a significant amount of editorial discretion regarding what their programming will include." The Court in that case invalidated, on statutory grounds, agency regulations that obliged cable operators to set aside certain channels for leased public access; these regulations, the Court held, "significantly compromise the editorial discretion actually exercised by cable operators" by preventing them from carrying programming they otherwise would disseminate and by "interfer[ing] with their determinations regarding the total service offering to be extended to subscribers." *Id.* at 707-08 n.17.

This Court has thus recognized that, like a newspaper, a cable operator "is more than a passive receptacle or conduit for news, comment and advertising," but rather engages in "[t]he choice of material . . . [that] constitute[s] the exercise of editorial control and judgment." *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974). By preventing cable operators from disseminating out-of-state broadcast signals and other advertiser-supported programming, Oklahoma has severely interfered with cable operators' selection of program-

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[67] *See, e.g., Home Box Office, Inc. v. FCC*, 567 F.2d 9, 43-51 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977); *Community Communications Co. v. City of Boulder*, 660 F.2d 1370, 1376 (10th Cir. 1981), *cert. dismissed*, 102 S. Ct. 2287 (1982); *Midwest Video Corp. v. FCC*, 571 F.2d 1025, 1053-56 (8th Cir. 1978), *aff'd on other grounds*, 440 U.S. 689 (1979); *Cruz v. Ferre*, No. 83-330-CIV-WMH (S.D. Fla. Aug. 2, 1983); *Community Television of Utah, Inc. v. Roy City*, 555 F. Supp. 1164 (D. Utah 1982); *Home Box Office, Inc. v. Wilkinson*, 531 F. Supp. 987 (D. Utah 1982).

ming. Such a serious intrusion into the "crucial process" of editing, *id.*, violates the First Amendment.[68]

Moreover, by restricting cable operators' editorial choices, the Oklahoma ban restricts the flow of information and ideas to the State's citizens. It is the fundamental command of the First Amendment that "government itself shall not impede the free flow of ideas." *Associated Press v. United States*, 326 U.S. 1, 20 (1945). The Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *Id.* In order to protect the national "free trade in ideas," *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting), and to further the "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open," *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), the First Amendment requires that government shall not restrain speakers from disseminating protected ideas and information to willing listeners.[69]

Oklahoma's asserted interest in suppressing truthful advertising about a lawful, albeit controversial, product cannot justify this severe obstruction to the national commerce in ideas. This Court has overturned various state efforts to prevent the dissemination of protected speech thought to include some objectionable commercial element. In *Jamison v. Texas*, 318 U.S. 413 (1943), for example, the Court reversed the conviction of a Jehovah's Witness for distributing religious handbills that included

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[68] *See also Columbia Broadcasting System v. Democratic National Committee*, 412 U.S. 94, 124-25 (1973); *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, 391 (1973).

[69] *See Martin v. City of Struthers*, 319 U.S. 141, 146-47 (1943) ("Freedom to distribute information to every citizen wherever he desires to receive it is . . . clearly vital to the preservation of a free society").

advertisements for religious books. The Court observed that states could then "prohibit the use of the streets for the distribution of purely commercial leaflets," *id.* at 417, but held that "[t]he mere presence of an advertisement" on a handbill promoting religious activity "may not subject the distribution of the handbill to prohibition." *Id.* at 416. *See also Murdock v. Pennsylvania*, 319 U.S. 105 (1943).

In *In re Primus*, 436 U.S. 412 (1978), the Court held that although states generally could forbid in-person solicitation by lawyers, such a ban could not be applied to solicitation by a lawyer for the American Civil Liberties Union. In such circumstances, the Court ruled, the impact of the solicitation ban went beyond commercial speech; the ban also threatened the ACLU's role "as a vehicle for effective political expression and association," *id.* at 431, and therefore implicated " 'core First Amendment rights.' " *Id.* at 432 (quoting *Buckley v. Valeo*, 424 U.S. 1, 44-45 (1976)).

Similarly, in *Bolger v. Youngs Drug Products Corp.*, 103 S. Ct. 2875 (1983), and *Linmark Associates v. Township of Willingboro*, 431 U.S. 85 (1977), the Court struck down advertising restrictions principally because of their impact on commercial speech, but also because they effectively restrained the dissemination of nonpromotional information—in *Linmark*, information about housing trends within the town; in *Bolger*, information regarding methods of birth control and parental discretion. *See* 431 U.S. at 95-96; 103 S. Ct. at 2884-85. The suppression of this information, the Court declared in *Bolger*, "constitutes a 'basic' constitutional defect regardless of the strength of the government's interest." 103 S. Ct. at 2885.[70]

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[70] In *Valentine v. Chrestensen*, 316 U.S. 52 (1942), this Court held that a distributor of handbills composed primarily of commercial advertising could not escape a municipal ban on commercial leafletting by affixing a civic protest to the advertising "with the intent,

To be sure, the Oklahoma ban does not expressly restrict the dissemination of cable programming and is apparently not intended to achieve this end. That does not make it any less unconstitutional. The fact that a regulation on its face is directed solely at commercial speech does not mean that its broader effect on noncommercial speech may be ignored. As this Court recently affirmed in *Bolger v. Youngs Drug Products Corp.*, 103 S. Ct. at 2880, every restriction on commercial speech "must be examined carefully to ensure that speech deserving of greater constitutional protection is not inadvertently suppressed." A government regulation is unconstitutional when so substantial an "effect on the exercise of First Amendment rights arises . . . as an unintended but inevitable result of the government's conduct." *Buckley v. Valeo*, 424 U.S. at 65.[71]

In *Bigelow v. Virginia*, this Court warned that enforcement of advertising bans against the press could severely restrain the press' ability to disseminate information and ideas:

> If application of this statute were upheld . . . Virginia might exert the power sought here over a wide variety of national publications or interstate newspapers carrying advertisements similar to the one that appeared in Bigelow's newspaper . . . . Other States might do the same. The burdens thereby imposed on publications would impair, perhaps severely, their proper functioning.

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and for the purpose, of evading the prohibition." *Id.* at 55. There can, of course, be no suggestion in this case that the cable operators carry news and entertainment programming in addition to wine commercials in order to evade Oklahoma's ban on alcoholic beverage advertising.

[71] *See also Elrod v. Burns*, 427 U.S. 347, 362 (1976); *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293, 297 (1961) ("[R]egulatory measures . . . cannot be employed in purpose *or in effect* to stifle, penalize, or curb the exercise of First Amendment rights") (emphasis added); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-61 (1958).

Id. at 828-29 (citations omitted). The regulations at issue here would produce precisely the results feared by this Court in *Bigelow*. The burden of the state regulation on an important medium of communication—cable television—is likely to be very great. The record documents that cable operators are heavily dependent on out-of-state programming. Virtually all out-of-state broadcast signals contain wine advertising, J.A. 21, 25, as do advertiser-supported cable programming services. This advertiser-supported programming is vital to attract subscribers and to supply revenues. J.A. 22, 37. By effectively banning the dissemination of out-of-state advertiser-supported programming, the state regulation would severely restrict the programming cable operators could offer their subscribers, cause them substantial financial losses, Pet. App. G at 42a, and even threaten their economic viability. J.A. 22.[72]

Although Oklahoma has not sought to prevent the sale within its borders of out-of-state publications containing liquor advertisements, the State has violated the First Amendment by effectively barring out-of-state cable programming just as surely as if it had forbidden distribution of the New York Times or Wall Street Journal. The presence of advertisements for alcoholic beverages in these media cannot justify the state in walling itself off from the national flow of ideas and information.

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[72] A State may not impose special burdens on the press that imperil or severely restrain its ability to function and to fulfill its constitutional role. *See, e.g., Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 103 S. Ct. 1365 (1983); *Grosjean v. American Press Co.*, 297 U.S. 233 (1936). *Cf. Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, 383, 390 (1973).

III. THE OKLAHOMA BAN IS PREEMPTED BY FEDERAL LAW AND AGENCY REGULATIONS.

The Oklahoma ban is also invalid under the Supremacy Clause because it conflicts with federal law and policy as reflected in the Communications Act, the Copyright Act, and Federal Communications Commission regulations and decisions.

A. The Federal Communications Commission's Mandatory Carriage Rules Require What Oklahoma Forbids.

The Oklahoma ban directly conflicts with rules of the Federal Communications Commission because it prevents cable systems operating near the Oklahoma border from transmitting to their subscribers commercial television signals that Commission rules require them to carry.

Cable operators in Oklahoma, as elsewhere, are required by Commission regulations to carry the signals of certain nearby television stations. 47 C.F.R. §§ 76.57-.61 (1982). This obligation applies to two types of commercial stations: those located within an operator's Commission-prescribed "zone" and those significantly viewed in the cable operator's community but located beyond the zone's perimeter. Commonly, cable systems located in one state are obligated to carry the signals of broadcast stations located in another state; in fact, the "must carry" rules result in the importation of out-of-state signals into approximately one-third of the land area of Oklahoma.[73] The Commission rules prescribe that these signals—like all television signals retransmitted by cable operators—must be "carried in full, without deletion or alteration of any portion." 47 C.F.R. § 76.55(b) (1982).[74] These

[73] Memorandum of the Federal Communications Commission as Amicus Curiae on Petition for a Writ of Certiorari at 10.

[74] The provision forbidding alteration extends to commercial advertising and is an important aspect of the regulatory scheme. *See, e.g., Garland B. Pugh*, 68 F.C.C.2d 997, 999 (1978).

rules have been held to be within the Commission's jurisdiction.[75]

State law is preempted when it forbids what federal law requires, such that " 'compliance with both federal and state regulations is a physical impossibility.' " [76] Plainly, cable companies doing business in Oklahoma cannot obey the "must carry" rules—which require the carriage of out-of-state broadcast signals that periodically contain wine advertising—and at the same time obey Oklahoma's command that they not carry any wine advertising. An actual conflict exists between state and federal requirements, and the state law must yield. *See, e.g., Free v. Bland*, 369 U.S. 663 (1962); *McDermott v. Wisconsin*, 228 U.S. 115 (1913).

B. State Regulation of Cable Signals Has Been Expressly Preempted by the Federal Communications Commission.

The invalidation of the state law as to "must carry" signals, however, would not end the matter. Many of the program services carried by Oklahoma cable systems and affected by the Oklahoma ban [77] are not subject to the mandatory carriage rules because they are not local tele-

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[75] *Black Hills Video Corp. v. FCC*, 399 F.2d 65 (8th Cir. 1968). A plurality of this Court endorsed the *Black Hills* holding in *United States v. Midwest Video Corp.*, 406 U.S. 649, 659 n.17 (1972), the Court having previously upheld the Commission's authority to regulate cable television in *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968). Challenges to the constitutionality of the "must carry" rules under the First Amendment are currently pending before the Court of Appeals for the District of Columbia Circuit in *Turner Broadcasting System, Inc. v. FCC*, No. 83-2050 (D.C. Cir., filed Oct. 4, 1983), and *Quincy Cable TV, Inc. v. FCC*, No. 83-1283 (D.C. Cir., filed May 31, 1983).

[76] *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, 103 S. Ct. 1713, 1722 (1983) (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963)).

[77] As noted above, both distant broadcasters and cable satellite programmers carry advertisements, including wine commercials.

vision signals. The other programs that Oklahoma cable operators transmit are originated either by distant television stations, including "superstations" such as WTBS in Atlanta, or by cablecasters such as CNN and ESPN that provide the sort of "innovative nonbroadcast services" which the Commission predicted in 1972 would become cable's most important service. *Cable Television Report and Order*, 36 F.C.C.2d at 167. The Commission has expressly announced that states may not regulate either type of service.

Even during the period from 1966 to 1980 when the Commission restricted distant television signal carriage, it made clear: "[T]hat this Commission has pre-empted jurisdiction of any and all signal carriage regulation is unquestioned . . . . [Localities] do not have any jurisdiction or authority relating to signal carriage." [78] In 1980, the Commission eliminated all limitations on the importation of distant signals,[79] but it has continued to preempt state regulation.[80]

The Commission has never limited the importation of satellite cable services such as CNN and ESPN and, as with television signals, has consistently adhered to the view that state regulation of such services is precluded. The Commission first announced in 1969 that specialized

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[78] *Clarification of the Cable Television Rules and Notice of Proposed Rulemaking and Inquiry*, 46 F.C.C.2d 175, 178 (1974). *See also Greater East Longmeadow Cablevision, Inc.*, 37 Rad. Reg. 2d (P & F) ¶ 1219, 1220-21 (1976) ("the field of signal carriage has been preempted by the Commission . . . ."); *Duplicative and Excessive Over-Regulation of Cable Television*, 54 F.C.C.2d 855, 863 (1975) ("The subject areas this agency has preempted include, of course, signal carriage . . . .").

[79] *Cable Television Syndicated Program Exclusivity Rules*, 79 F.C.C.2d 652 (1980), *aff'd, Malrite T.V. of New York v. FCC*, 652 F.2d 1140 (2d Cir. 1981).

[80] *See, e.g., Telecable Associates, Inc.*, 51 Rad. Reg. 2d (P & F) ¶¶ 147, 152 (1982).

cable services should not be regulated by either the Commission or the states. *First Report and Order*, 20 F.C.C. 2d 201, 205 (1969). In 1974 the Commission explicitly stated that it was "preempting the field" of nonbroadcast services, including made-for-cable satellite-carried signals.[81] The Commission noted that state regulation of specialized or auxiliary cable offerings[82] would conflict with its own determination to give cablecasters wide latitude in developing new programs and services:

> No one has any firm idea of how any of these services will develop or how much they will cost. Hence, for now we are preempting the field and have decided not to impose restrictive regulations [of our own].

Id. at 200. *See also First Report and Order*, 52 F.C.C.2d 1, 67, 68 (1975) (preempting local regulation "of rates [of subscription cablecasting] as well as program content"; "determinations as to when and how to regulate . . . must be made at the federal level"). The Commission's 1974 preemption order was sustained in *Brookhaven Cable TV, Inc. v. Kelly*, 573 F.2d 765 (2d Cir. 1978), *cert. denied*, 441 U.S. 904 (1979), in which the court held that the Commission had jurisdiction under the Communications Act to issue the order based on this Court's decision in *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972) (plurality opinion).

The Commission recently confirmed that its preemption orders extend to programming services such as CNN and ESPN. *See Community Cable TV, Inc.*, FCC 83-525 (Nov. 15, 1983). Indeed, the Commission specifically referred to the state regulation at issue here and declared

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[81] *Clarification of the Cable Television Rules and Notice of Proposed Rulemaking and Inquiry*, 46 F.C.C.2d at 200.

[82] The Commission did not define specialized or auxiliary services but stated that they would include, *inter alia*, specialized programming, advertising, and pay services. *Id.* at 199-200.

that such "[s]tate controls over advertising on cable channels distributed by space satellite . . . undermine the goals of preemption articulated by the Commission in this and earlier cases." Slip op. at 14 n.26. The Commission explained that such regulation "may undercut the economic base for [cable programming services] and render their operation on an interstate basis a practical impossibility." *Id.*

As this Court has held, when a federal intention to "occupy the field" is apparent, state regulation is prohibited. *See, e.g., Campbell v. Hussey*, 368 U.S. 297 (1961). Recently, in *Fidelity Federal Savings & Loan Association v. De La Cuesta*, 458 U.S. 141 (1982), this Court confirmed that a federal agency has the authority, without express congressional endorsement, to preempt state action. This power exists although the federal regulation does not require, but merely permits, what the State seeks to forbid. *Id.* at 155. Like the federal agency in *Fidelity*, the Federal Communications Commission has "unambiguous[ly]" expressed its intention to occupy the field of signal carriage—covering both broadcast and satellite-carried programming—and to preempt contradictory state regulations. The Oklahoma law must therefore be invalidated.[83]

C. Apart From Express Preemption, the Oklahoma Ban Conflicts With Federal Policies.

Even apart from the Commission's "must carry" rules and preemption orders, it is clear that federal policies in this area cannot accommodate state interference of the sort undertaken by Oklahoma.

The signals which Oklahoma would oblige its cable operators to cease carrying are precisely the distant television signals and satellite-carried programming services

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[83] *See, e.g., Fidelity Federal Savings & Loan Association v. De La Cuesta*, 458 U.S. at 154; *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947).

which the Commission has increasingly sought to encourage cable operators to deliver to their subscribers. Even in 1966, when the Commission limited the importation of distant signals, the Commission identified as one of its two goals in the cable area the delivery to the public of "the enriched programming selection which [cable] makes available." [84] Repeal in 1972 of the hearing requirement for carriage of distant signals [85] was intended to accelerate the availability of those signals throughout the country.[86]

The rescission in 1980 of all limitations on distant signal carriage was intended further to "broaden[] the range of options available to television viewers." 45 Fed. Reg. 60,299 (1980) (statement of Commission Chairman Ferris). The Commission declared that by "permitting the carriage of additional signals . . . [m]illions of households may be afforded not only increased viewing options, but also access to a diversity of services from cable television that presently is unavailable in their communities." *Cable Television Syndicated Program Exclusivity Rules*, 79 F.C.C.2d at 746 (1980). In upholding the Commission's action, the Second Circuit relied largely on the reasonableness of the Commission's finding that "consumers would be decidedly better off due to increased viewing options from the greater availability of expanded cable services." *Malrite T.V. of New York v. FCC*, 652 F.2d at 1146.

The Commission also strongly encourages the development of satellite-carried cable signals. As noted earlier, at no time has the Commission attempted to limit the

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[84] *Second Report and Order*, 2 F.C.C.2d 725, 745-46 (1966).

[85] Until 1972 cable operators could import distant signals into major television markets only after an evidentiary hearing and a finding that the signals' carriage would not unduly harm television broadcast service in the area. 47 C.F.R. § 74.1107 (1966).

[86] *Cable Television Report and Order*, 36 F.C.C.2d 143, 148, 165 (1972), *aff'd sub nom. ACLU v. FCC*, 523 F.2d 1344 (9th Cir. 1975).

number of such signals a cable operator could import. As early as 1969 the Commission declared that "the public interest would be best served . . . by encouraging [cable] to experiment . . . in the expectation that the end result will be significant added diversity for the public." [87] By 1972, the Commission was of the belief that cable's greatest promise lay in services other than retransmission of broadcast signals.[88] In 1974, when it announced its preemption of local price regulation of specialized cable programming and its decision not to impose regulations of its own, the Commission again emphasized its desire to preclude States from hindering development of "the emerging cable industry and its prospects for introducing new and innovative communications services." [89] This view was recently confirmed in *Community Cable TV, Inc.*, FCC 83-525 (Nov. 15, 1983), in which the Commission observed that state regulation such as Oklahoma's would "impede new cable services and burden interstate communications." Slip op. at 14 n.26.

The Oklahoma ban conflicts also with a second, related federal policy, a policy derived from the First Amendment and embodied in Section 3(h) of the Communications Act: preservation of editoral discretion. In *FCC v. Midwest Video Corp.*, 440 U.S. 689, 705 (1979), this Court held that the Commission was prevented by Congress' desire "to preserve editorial control of programming in the [cable] licensee" from compelling cable operators to set aside channels for community access programming. Thus, federal policy requires that cable operators enjoy "a significant amount of editorial discretion regarding what their programming will include."

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[87] *First Report and Order*, 20 F.C.C.2d at 205. Also in 1969 the Commission decided that cable programmers should be permitted "to derive revenues from commercials." *Id.* at 208.

[88] *Cable Television Report and Order*, 36 F.C.C.2d at 167.

[89] *Clarification of the Cable Television Rules and Notice of Proposed Rulemaking and Inquiry*, 46 F.C.C.2d at 199.

Id. at 707. *See also Columbia Broadcasting System v. Democratic National Committee*, 412 U.S. 94, 110 (1973).[30]

The third relevant federal policy which is subverted by the Oklahoma ban is found in the Copyright Act of 1976, 17 U.S.C. §§ 101-18 (1982). The legislation constituted a major revision of federal copyright law, and it was the first time that Congress acted substantively in the cable field. In approaching the bill, Congress first determined to subject cable retransmissions of distant broadcast signals to some form of copyright liability. Having made this initial decision, Congress was concerned that the extension of traditional copyright liability to cable systems, which would require negotiations between the cable system and every copyright owner, would unduly restrict the availability of programming to this new and important medium.[31] The tenor of discussion was how Congress could grant television program suppliers some copyright protection while promoting the growth of the cable industry. To this end, Congress determined to create a compulsory licensing scheme to facilitate signal carriage. 17 U.S.C. § 111(c) (1982). As part of the compulsory licensing scheme, Congress provided that cable operators

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[30] The "must carry" rules discussed above have been justified by the Commission as designed to serve other purposes of the Communications Act by protecting local broadcast stations.

[31] The president of the National Community Television Association had argued that requiring cable operators to obtain program-by-program retransmission consent could very well force the cable industry "out of existence to the great injury [of] the public." *Hearings on S. 1006 Before the Subcomm. on Patents, Trademarks, and Copyrights of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. 86 (1966) ("*Hearings*"). The Commission, in 1972, reached the same conclusion. *Cable Television Report and Order*, 36 F.C.C.2d at 164 (program-by-program retransmission consent inconsistent with Commission's "basic objective . . . to get cable moving so that the public may receive its benefits"). *See also* H.R. Rep. No. 1476, 94th Cong., 2d Sess. 89 (1976) (alternative of requiring program-by-program negotiations rejected as "impractical and unduly burdensome [on cable operators]").

could obtain automatic licenses only if they carried the broadcast signals, including commercial advertisements, without "willfully alter[ing]" them. 17 U.S.C. § 111(c)(3) (1982).

The suggestion of compulsory licensing arose at the first hearing on these copyright proposals as an appropriate vehicle "to assure the public access to the variety of television programs [which cable makes available]."[92] Ultimately, in recommending the bill that became law, the House Judiciary Committee "wished [through the compulsory licensing scheme] to permit and encourage the broader dissemination of communications through cable."[93] Congress also made it clear that it favored importation of distant broadcast signals into all areas of the country, rejecting an earlier suggestion that cable operators be required to demonstrate that a given market was underserved before they could receive the automatic licenses.[94]

Oklahoma effectively prevents the importation of signals obtained pursuant to compulsory licensing and thereby prevents the "accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941), because it discourages conduct that federal action seeks to encourage.

Although Oklahoma may not have intended its advertising ban to frustrate federal law and policy, the ban is nevertheless preempted as applied here because it actually conflicts with federal law and stands as an obstacle to the achievement of federal objectives. In *Perez v.*

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[92] *Hearings* at 81 (colloquy between Thomas C. Brennan, committee chief counsel, and Rosel H. Hyde, Federal Communications Commission chairman). *See also id.* at 1 (opening remarks by Sen. Burdick) ("public interest in providing for the widest possible dissemination of information").

[93] 122 CONG. REC. 32,009 (1976) (remarks of Cong. Danielson).

[94] *Hearings* at 86.

Campbell, 402 U.S. 637, 651-52 (1971), this Court ruled that:

> [w]e can no longer adhere to the aberrational doctrine . . . that state law may frustrate the operation of federal law as long as the state legislature in passing its law had some purpose in mind other than one of frustration.

Nor does it matter for preemption purposes that the State invokes the Twenty-first Amendment as authority for its ban. In *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), this Court invalidated state liquor resale pricing regulations to the extent that they conflicted with the federal antitrust laws. The Court rejected the suggestion that the state law should prevail because of added authority conferred on the State by the Twenty-first Amendment: "[T]he Twenty-first Amendment provides no shelter for the violation of the Sherman Act caused by the State's wine-pricing program." *Id.* at 114. Similarly, the Court has held that the Twenty-first Amendment bars the states from regulating alcoholic beverages on United States military bases or in national parks. *United States v. State Tax Commission*, 412 U.S. 363 (1973); *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518 (1938). *See also Free v. Bland*, 369 U.S. 663, 666 (1962).

In summary, the Oklahoma ban is invalid because it conflicts with the Commission's mandatory carriage rules, the agency's explicit preemption determinations, and federal communications and copyright policy.

CONCLUSION

For the foregoing reasons the judgment of the United States Court of Appeals for the Tenth Circuit should be reversed.

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November 17, 1983

APPENDIX

APPENDIX

CONSTITUTIONAL PROVISIONS AND REGULATIONS INVOLVED *

The Supremacy Clause to the Constitution of the United States provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 76.57 of the rules of the Federal Communications Commission, 47 C.F.R. § 76.57, provides, in relevant part:

> A community unit operating in a community located wholly outside all major and smaller television markets, as defined in § 76.5, shall carry television broadcast signals in accordance with the following provisions:
>
> (a) Any such community unit may carry or, on request of the relevant station licensee or permittee, shall carry the signals of:
>
> (1) Television broadcast stations within whose Grade B contours the community of the community unit is located, in whole or in part;
>
> * * * *
>
> (4) Commercial television broadcast stations that are significantly viewed in the community of the community unit. See § 76.54.

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* Other pertinent constitutional provisions, statutes and regulations were included in Appendix H to the petition for certiorari.

Section 76.59 of the rules of the Federal Communications Commission, 47 C.F.R. § 76.59, provides, in relevant part:

> A community unit operating in a community located in whole or in part within a smaller television market, as defined in § 76.5, shall carry television broadcast signals only in accordance with the following provisions:
>
> (a) Any such community unit may carry or, on request of the relevant station licensee or permittee, shall carry the signals of:
>
> (1) Television broadcast stations within whose specified zone the community of the community unit is located, in whole or in part;
>
> * * * *
>
> (3) Commercial television broadcast stations licensed to communities in other smaller television markets, within whose Grade B contours the community unit is located, in whole or in part;
>
> (4) Television broadcast stations licensed to other communities which are generally considered to be part of the same smaller television market (Example: Burlington, Vt.—Plattsburgh, N.Y., television market);
>
> * * * *
>
> (6) Commercial television broadcast stations that are significantly viewed in the community of the community unit. See § 76.54.
>
> * * * *
>
> (c) Where the community is located wholly or partially within one of the major television markets listed in § 76.51(a) and also wholly or partially within a smaller television market, the carriage provisions for the major markets shall apply.

Section 76.61 of the rules of the Federal Communications Commission, 47 C.F.R. § 76.61, provides, in relevant part:

Where a system serves a community that is located in whole or in part within a major television market, that community unit shall carry television broadcast signals only in accordance with the following provisions:

(a) Any such community unit may carry, or on request of the relevant station licensee or permittee, shall carry the signals of:

(1) Television broadcast stations within whose specified zone the community of the community unit is located, in whole or in part: *Provided, however,* That where a community unit is located in the designated community of a major television market, it shall not carry the signal of a television station licensed to a designated community in another major television market, unless the designated community in which the community unit is located is wholly within the specified zone (see § 76.5(f)) of the station, except as otherwise provided in this section;

* * * *

(4) Television broadcast stations licensed to other designated communities of the same major television market (Example: Cincinnati, Ohio-Newport, Ky., television market);

(5) Commercial television broadcast stations that are significantly viewed in the community of the community unit. See § 76.54.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CAPITAL CITIES CABLE, INC., COX CABLE OF OKLAHOMA CITY, INC.; MULTIMEDIA CABLEVISION, INC.; AND SAMMONS COMMUNICATIONS, INC.,
Petitioners,

v.

RICHARD A. CRISP, DIRECTOR, OKLAHOMA ALCOHOLIC BEVERAGE CONTROL BOARD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR PETITIONERS COX CABLE OF OKLAHOMA CITY, INC., MULTIMEDIA CABLEVISION, INC., SAMMONS COMMUNICATIONS, INC.

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QUESTIONS PRESENTED

1. Whether a state's blanket prohibition of alcoholic beverage advertising on cable television programming originating outside the state is invalid by operation of the Supremacy Clause, where such prohibition results in a direct conflict with federal law and policy.

2. Whether a state, consistent with the protection of commercial speech under the First and Fourteenth Amendments, may adopt a sweeping ban on truthful, nonmisleading advertising for a lawful product.

3. Whether a state, consistent with the First and Fourteenth Amendments, may prevent cable television operators from carrying out-of-state news and entertainment programs because those programs contain truthful, nonmisleading advertising for wine.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-1795

CAPITAL CITIES CABLE, INC., COX CABLE OF OKLAHOMA CITY, INC.; MULTIMEDIA CABLEVISION, INC.; AND SAMMONS COMMUNICATIONS, INC.,
Petitioners,

v.

RICHARD A. CRISP, DIRECTOR, OKLAHOMA ALCOHOLIC BEVERAGE CONTROL BOARD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR PETITIONERS COX CABLE OF OKLAHOMA CITY, INC., MULTIMEDIA CABLEVISION, INC., SAMMONS COMMUNICATIONS, INC.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 699 F.2d 490 and appears in the Appendix to the Petition for Certiorari. The two opinions of the United States District Court for the Western District of Oklahoma granting a preliminary injunction and granting a summary judgment are not reported, but both are reprinted in the Appendix to the Petition for Certiorari.

JURISDICTION

The judgment of the Court of Appeals was entered on January 24, 1983. On March 21, 1983, the Court of Appeals denied a Petition for Rehearing filed by Petitioners. PA at 26a.[1] Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

This case involves Article I, Section 8, Clause 3 and Article VI, Clause 2 and the First, Fourteenth, and Twenty-first Amendments to the Constitution of the United States; The Communications Act of 1934, as amended, 47 U.S.C. § 151, *et seq.;* Section 111(c)(3) of the Copyright Act of 1976, 17 U.S.C. § 111(c)(3); Sections 76.55(b), 76.57-.61 of the rules of the Federal Communications Commission ("FCC"), 47 C.F.R. §§ 76.55(b), 76.57-.61 (1982); Article 27, Section 5 of the Constitution of the State of Oklahoma; and Section 516 of the Oklahoma Beverage Control Act, Okla. Stat. Ann. tit. 37, § 516.

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[1] References to "PA at _____" are to the Appendix in the Petition for Certiorari, while references to "JA at _____" are to the Joint Appendix.

STATEMENT OF THE CASE

Petitioners operate cable television systems in the State of Oklahoma. Much of Petitioners' cable service is composed of programming that originates outside Oklahoma and is received by Petitioners' systems, by means of a standard off-air antenna, microwave receiver, or satellite dish, and retransmitted by wire to their subscribers. JA at 21-23. In some cases the FCC's so-called "must-carry" rules mandate Petitioners' carriage of signals from out-of-state television stations.[2] Aside from their "must-carry" obligations, cable operators select out-of-state programming voluntarily, and it is this programming which typically furnishes the systems' primary appeal to subscribers. JA at 21-22. Out-of-state programming voluntarily carried by Petitioners includes the signals of commercial television stations located in neighboring Kansas, Missouri and Texas and the signals of so-called "super stations" from such cities as Atlanta and Chicago.[3] This programming occasionally contains wine commercials that are permitted under federal law and in the states where they originate. PA at 4la; JA at 21, 25, 36. Petitioners also provide advertiser-supported national cablecasting program services, such as the Cable News Network (CNN), which also typically include wine commercials. [4]

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[2] JA at 21-23, 34-37. 47 C.F.R. §§ 76.57-.61 (1982).

[3] JA at 21-23, 35-36. A "super station" is an independent television station whose signal is relayed via satellite to cable systems beyond the normal reach of its over-the-air signal.

[4] The FCC's definition of "cablecasting" includes satellite-delivered national cable program services such as CNN, Entertainment Sports and Programming Network (ESPN) and USA Network. 47 C.F.R. § 76.5(v) (1982). *See also United States v. Midwest Video Corp.*, 406 U.S. 649, 653 n.6 (1972) (plurality opinion) ("cablecasting" defined as the transmission of "programs produced by the CATV operator and 'films and tapes produced by others, and CATV network programming' ").

The sale and consumption of alcoholic beverages are lawful in the State of Oklahoma. 699 F.2d at 500; PA at 19a-20a, 42a. By statute, however, the state makes it unlawful "for any person, firm or corporation to advertise any alcoholic beverages or the sale of same within the State of Oklahoma, except one sign at the retail outlet bearing the words 'Retail Alcoholic Liquor Store.' " Oklahoma Alcoholic Beverage Control Act, Okla. Stat. Ann. tit. 37, § 516.[5] The act specifically defines wine as an alcoholic beverage within the scope of the advertising ban. *Id.* § 506(3). The advertising of beer is permitted.[6]

The Oklahoma Attorney General has construed the liquor advertising ban not to apply to advertisements appearing in newspapers, magazines and other publications printed outside Oklahoma, including publications specifically designed for circulation within the state.[7] Out-of-state publications may be delivered to Oklahoma subscribers and sold at outlets within the state even though they contain wine or liquor advertising. 699 F.2d at 493 n.1, 502; PA at 5a, 23a-24a.

For many years, the state applied a similar policy to cable operators, and they were permitted to carry out-of-state cable programming containing wine commercials. 699 F.2d at 492; PA at 4a, 41a. In March 1980, however, the Oklahoma Attorney General issued an opinion stating that retransmission of such wine commercials by cable systems operating in Oklahoma would be considered a violation of state law. *Op. Okla. Att'y Gen.* No. 79-334 (March 19, 1980). Respondent Richard Crisp, Director of the Oklahoma Alcoholic Beverage Control Board, notified all Oklahoma cable operators, including Peti-

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[5] PA at 53a; *see also* Okla. Const. art. 27, § 5.

[6] 699 F.2d at 492, 502; PA at 3a-4a, 23a. The state's definition of alcoholic beverages includes beer containing more than 3.2 percent alcohol by weight. Okla. Stat. Ann. tit. 37, § 506(3). However, because beer advertising does not generally specify alcoholic content, the advertising of beer generally is allowed. 699 F.2d at 492; PA at 3a-4a.

[7] *See, e.g., Op. Okla. Att'y Gen.* No. 76-348 (November 24, 1976).

tioners, that they faced imminent criminal prosecution if they continued to carry the out-of-state wine commercials.[8]

Federal law prohibits cable television operators from altering the content of the television signals, including commercials, that they retransmit to their subscribers. 699 F.2d at 492; PA at 4a, 40a. Section 76.55(b) of the FCC's rules, 47 C.F.R. § 76.55(b) (1982), requires that television programming retransmitted by a cable system "shall be carried in full, without deletion or alteration of any portion." The FCC has specifically held that this regulation forbids the deletion of commercial messages.[9] Moreover, Section 111(c)(3) of the Copyright Act of 1976, 17 U.S.C. § 111(c)(3), expressly prohibits Petitioners from willfully deleting a commercial advertisement from a television signal.

Even if the deletion of the out-of-state wine commercials were lawful, there would be, as the District Court found, "no feasible way for [Petitioners] to block out the advertisements." PA at 41a. Petitioners have no contractual relationship with the out-of-state television stations whose signals they carry, no control over the programming included by the stations in those signals, and no advance notice from the stations concerning the scheduling of wine commercials. PA at 40a; JA at 24-26, 37-39. Petitioners' reception and retransmission of the television signals occur simultaneously. JA at 30. As a practical matter, therefore, Petitioners would be unable to delete each wine commercial in its entirety as it appears; to attempt deletion of

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[8] 699 F.2d at 492; PA at 4a, 41a; JA at 11. In Oklahoma, a public official such as Respondent is required to follow the Attorney General's opinion until relieved of the obligation by a court of competent jurisdiction. *See, e.g., Aetna Casualty & Surety Co. v. State Bd. for Property and Casualty Rules*, 637 P.2d 1251, 1254 (Okla. 1981).

[9] *See Garland B. Pugh*, 68 F.C.C.2d 997, 999 (1978) ("Section 76.55(b) of the Rules . . . is meant to prohibit advertising deletions as well"); *WAPA-TV Broadcasting Corp.* 59 F.C.C.2d 263, 272 (1976); *Notice of Proposed Rulemaking and Notice of Inquiry in Docket 18397*, 15 F.C.C.2d 417, 444 (1968).

each wine commercial would require an extremely burdensome, costly effort by Petitioners to monitor each signal continuously.[10]

Petitioners would thus be compelled to discontinue their carriage of all cable programming containing wine commercials received from sources outside Oklahoma. This would deprive Oklahoma residents of access to national cablecasting program services and the programming offered by the "super stations," as well as that provided by less distant stations whose signals are available to Oklahoma residents only by means of cable retransmission. Some Oklahoma towns would receive no television signal at all if cable operators could not import signals from outside the state. JA at 36-37.

Failure to carry out-of-state signals would place some cable operators in violation of the FCC's "must-carry" rules which require them to carry certain out-of-state signals to their subscribers. JA at 21-23, 35-37. Additionally, by preventing the carriage of out-of-state cable programming, Oklahoma's ban on alcoholic beverage advertising would deny cable operators the ability to offer much of their most popular programming. JA at 22, 37. As the District Court found, this would cause the operators a substantial loss in subscriber revenue and in some cases imperil their financial survival. PA at 42a; JA at 22.

District Court Proceedings

After being warned by state officials that they would be prosecuted if they continued to retransmit out-of-state wine commercials, Petitioners brought an action on March 3, 1981, in United States District Court for the Western District of Oklahoma against Respondent Richard Crisp in his official capacity as director of the Oklahoma Alcoholic Beverage Control Board. JA at 7-11. Petitioners sought injunctive relief

[10] PA at 29a; JA at 24-27, 29-31, 36-39. *See also Cable Television Report and Order*, 36 F.C.C.2d 143, 154-56, 165 (1972) (Commission rejects as unworkable its own proposal that would have required some cable systems to delete commercials from certain distant television signals).

against the application of Oklahoma's liquor advertising ban to their carriage of wine commercials and programming containing such commercials and sought a declaratory judgment that such application would, *inter alia*, violate their right to freedom of speech guaranteed by the First and Fourteenth Amendments.[11]

Following an evidentiary hearing on March 6, 1981, the District Court granted a preliminary injunction enjoining Crisp from enforcing the advertising ban against Petitioners' carriage of wine commercials. PA at 28a-30a. On December 18, 1981, the District Court entered summary judgment for Petitioners and issued a permanent injunction. PA at 31a-32a. An opinion supporting the orders was filed by the District Court on February 10, 1982.[12]

The District Court found that the wine commercials carried by Petitioners were not false or misleading and did not advocate unlawful activity and therefore held that they were entitled to First Amendment protection under the decisions of this Court regarding commercial speech. PA at 47a. The District Court ruled that Oklahoma's "blanket suppression" of this advertising violated the First Amendment, relying on *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), and other decisions of this Court for the proposition that in the area of commercial speech "the State cannot totally prohibit the dissemination of truthful information about a lawful activity." PA at 46a, 49a.

The District Court rejected the contention that Oklahoma's power to regulate liquor under the Twenty-first Amendment superseded the requirements of the First Amendment. *Id.* at 45a-46a. The District Court also found that Oklahoma's

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[11] Petitioners also alleged that enforcement of the liquor advertising ban against them would violate the Commerce and Supremacy Clauses of the United States Constitution, Articles I and VI, and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Federal jurisdiction was invoked under 28 U.S.C. §§ 1331, 1343 and 2201 and 42 U.S.C. § 1983.

[12] PA at 33a-50a. The February 10 opinion replaced an opinion filed with the original orders. As the Tenth Circuit noted, the opinions were "nearly identical." 699 F.2d at 493; PA at 5a.

advertising ban failed to satisfy the requirements of *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980), because it only remotely and ineffectively, if at all, served the state's asserted interests in discouraging alcohol abuse. PA at 48a. The District Court demonstrated that enforcement of the ban against Petitioners would merely prohibit them "from disseminating advertisements of something the public already knows from experience and from reading [out-of-state] newspaper and magazine advertising —that alcoholic beverages exist and are for sale at certain prices." *Id.* at 45a. The District Court also concluded that the ban was contrary to this Court's holding in *Central Hudson* because there existed alternative measures, such as educational programs, to combat alcohol abuse more effectively without infringement on First Amendment interests. Finally, the District Court found that "there exists no feasible way for [cable operators] to block out the advertisements." [13]

The Court of Appeals' Decision

On appeal, the Tenth Circuit reversed, holding that enforcement of Oklahoma's liquor advertising ban against Petitioners did not violate the First Amendment.[14] The Tenth Circuit concurred with the District Court's conclusion that the wine advertisements carried by the cable operators concerned lawful activity, were not false or misleading, and therefore were "protected speech under the First Amendment." 699 F.2d at 500; PA at 20a. Nevertheless, the Tenth Circuit sustained the advertising ban, holding that this result was compelled by the Supreme Court's summary dismissal of the appeal in *Queensgate Investment Co. v. Liquor Control Comm'n*, ____ U.S. ____, 103 S.Ct. 31 (1982), which was decided after the District Court's decision.[15] Although the Tenth Circuit recognized that

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[13] PA at 40a-41a, 48a-49a. The District Court did not reach Petitioners' other constitutional claims. PA at 39a-40a.

[14] Petitioners' other constitutional claims were not addressed by the Tenth Circuit.

[15] *Queensgate* involved an appeal from a decision by the Ohio Supreme Court that sustained the constitutionality of that state's partial ban on off-premises advertising of liquor prices by certain holders of liquor permits. *Queensgate Investment Co. v. Liquor Control Comm'n*, 433 N.E.2d 138 (Ohio), *appeal dismissed*, ____ U.S. ____, 103 S.Ct. 31 (1982).

Oklahoma's restrictions "are indeed broader than the regulation in *Queensgate*," 699 F.2d at 497; PA at 15a, it concluded that this Court's dismissal of the *Queensgate* appeal "mandate[d]" reversal of the District Court decision. 699 F.2d at 502; PA at 24a.

In addition to relying on *Queensgate*, the Tenth Circuit held that the Oklahoma ban should be sustained because of "the additional deference owed to the legislature as a result of the Twenty-first Amendment." 699 F.2d at 501; PA at 22a. The Tenth Circuit did not require the state to justify its infringement of First Amendment rights by the stringent standard required by *Central Hudson* and upheld the Oklahoma restrictions after finding them "reasonably related to reducing the sale and consumption of [alcoholic] beverages and their attendant problems," and "no more extensive than is necessary to serve Oklahoma's asserted interest." 699 F.2d at 501-502; PA at 22a, 24a.

Although the court noted that cable television operators were precluded by federal law from deleting out-of-state wine commercials from the cable programming they carry, 699 F.2d at 492; PA at 4a, and that they "especially are placed in a difficult position" by the liquor advertising ban, 699 F.2d at 502; PA at 23a, the court did not explain how the state, consistent with the Supremacy Clause or the First Amendment, could effectively prohibit the carriage of out-of-state cable programming. Nor did the Tenth Circuit indicate how cable programming could be distinguished in this respect from magazines and newspapers which are allowed to be distributed and sold in Oklahoma even though they contain liquor advertisements.

SUMMARY OF ARGUMENT

I

Opinions of this Court hold repeatedly that the Twenty-first Amendment creates only a narrow exception to the Commerce Clause, and does not constrict protections afforded by the First and Fourteenth Amendments. The decision below failed to acknowledge that, under the Twenty-first Amendment, a

state can impose only very limited restrictions on speech without violating the First and Fourteenth Amendments.

II

The federal government has preempted the regulation of cable programming importation. Under the Communications Act and the Copyright Act, cable operators cannot, without violating federal law, delete any portion of imported television programming, or alter it in any other way. Oklahoma's requirement to delete wine advertising therefore would force Oklahoma's cable operators to refrain from carrying any out-of-state television signals, for the commands of federal law cannot be reconciled with those of the state. In certain circumstances, the failure to carry such out-of-state television signals would itself be a violation of federal law. Similarly, deletion of other out-of-state cable programming frustrates federal policy to enlarge the variety of program services available on cable nationwide. Such a drastic curtailment of cable service directly conflicts with the federal policy encouraging carriage of out-of-state cable programming. Therefore, under the Supremacy Clause, Oklahoma's regulation must fall.

III

The Oklahoma scheme also is unconstitutional under the First Amendment. The Tenth Circuit analyzed this case under *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980), and found no constitutional violation; but it failed properly to apply the third and fourth parts of the *Central Hudson* test. Under the third part, restrictions on liquor advertising fail to pass scrutiny because they are so tenuously related to controlling intemperance. Under the fourth part, Oklahoma's failure to rely on less drastic means (including forbidding the importation or sale of alcoholic beverages within the state) dooms the regulations.

The Tenth Circuit's reliance on the *Central Hudson* test is itself in error because the broad sweep of Oklahoma's regulation condemns it on more fundamental First Amendment grounds. Oklahoma's restrictions are in effect a flat ban on importing cable programming and, as a consequence, are a prior restraint of protected cultural, political and commercial

expression. This cannot be justified by Oklahoma's Twenty-first Amendment interest, and violates basic First Amendment principles set down by this Court.

ARGUMENT

I

THE TWENTY-FIRST AMENDMENT DOES NOT JUSTIFY OKLAHOMA'S LIQUOR ADVERTISING BAN AS IT RELATES TO CABLE PROGRAMMING BECAUSE FEDERAL LAW HAS PREEMPTED THE FIELD AND THE BAN VIOLATES PETITIONERS' FIRST AMENDMENT RIGHTS

The Tenth Circuit upheld Oklahoma's ban of liquor advertising in cable programming even though it recognized that such "regulation of commercial speech . . . might not otherwise be permissible." The court believed "that the Supreme Court's summary dismissal in [*Queensgate Investment Co. v. Liquor Control Comm'n*, ____ U.S. ____, 103 S.Ct. 31 (1982)] mandates this result." [16]

The precedential effect of a summary action extends no farther than "the precise issues presented and necessarily decided by those actions." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). The facts and issues in *Queensgate* bear little resemblance to the facts and issues in this case. In *Queensgate* the holder of a permit to sell liquor by the drink challenged a state regulation that prohibited permit holders from referring to price

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[16] 699 F.2d at 502; PA at 24a. Summary disposition of an appeal by this Court, either by affirmance or by dismissal for want of a substantial federal question, is a disposition on the merits which is binding on lower counts. *See Hicks v. Miranda*, 422 U.S. 332, 344-345 (1975). Summary actions of this Court should not be interpreted by lower courts "as breaking new ground," but rather should be construed "as applying principles established by prior decisions to the particular facts involved." *Mandel v. Bradley*, 432 U.S. at 176. The precedential effect of such a decision in this Court is limited. *See, e.g., Edelman v. Jordan*, 415 U.S. 651, 670-671 (1974)(summary dispositions not accorded the full weight of decisions in which the issues were fully explored).

or price advantage in their advertising. Ohio law allowed other forms of advertising by permit holders and permitted manufacturers and distributors of liquor to advertise. In this case, Petitioners are not liquor retailers; rather, they are operators of cable television systems which provide a wide variety of cable programming including news, editorials, documentaries, entertainment and other ideas and information to subscribers in Oklahoma. Moreover, Petitioners' business is the interstate importation of cable programming, whereas the advertising regulated in *Queensgate* was solely intrastate activity of the state's liquor permit holders. The facts of *Queensgate* and of this case thus present constitutional issues that are neither precisely the same nor "substantially similar," as the Tenth Circuit erroneously found. 699 F.2d at 497; PA at 13a.

The Ohio Supreme Court's decision upholding the state's power to regulate limited kinds of intrastate liquor advertising by its own permittees may be unexceptionable. However, the Tenth Circuit's reliance on the summary dismissal in *Queensgate* to uphold Oklahoma's blanket advertising ban on interstate cable programming is directly contrary to this Court's decisions interpreting the relationship between the Twenty-first Amendment and other constitutional provisions.

As a result of its reading of *Queensgate*, the Tenth Circuit found that Oklahoma's "general police power as enhanced by the Twenty-first Amendment" permits its blanket advertising ban. 699 F.2d at 498; PA at 15a. This Court, on the other hand, has consistently held that the Twenty-first Amendment does not save a regulation that otherwise runs afoul of established constitutional principles. The Twenty-first Amendment does not alter the principles of the Establishment Clause of the First Amendment, *Larkin v. Grendel's Den, Inc.*, ____ U.S. ____, 103 S.Ct. 505, 510 n.5 (1982), the Equal Protection Clause of the Fourteenth Amendment, *Craig v. Boren*, 429 U.S. 190, 209-210 (1976); *see also Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 178-179 (1972), or the Due Process Clause of the Fourteenth Amendment, *Wisconsin v. Constantineau*, 400 U.S. 433, 436 (1971). Nor does the Twenty-first Amendment free the states from restrictions upon the police power imposed by

other constitutional provisions. *See California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 108 (1980).[17]

In *Craig v. Boren*, 429 U.S. 190 (1976), this Court reviewed the history leading up to the passage of the Twenty-first Amendment and concluded that it "primarily created an exception to the normal operation of the Commerce Clause." *Id.* at 206. Further:

> Once passing beyond consideration of the Commerce Clause, the relevance of the Twenty-first Amendment to other constitutional provisions becomes increasingly doubtful. As one commentator has remarked: "Neither the text nor the history of the Twenty-first Amendment suggests that it qualifies individual rights protected by the Bill of Rights and the Fourteenth Amendment where the sale or use of liquor is concerned."

Id. (citation omitted). *A fortiori* the Twenty-first Amendment does not qualify individual rights protected by the Bill of Rights and the Fourteenth Amendment where the *advertising* of liquor is concerned.

The Court in *Craig v. Boren* held that the Twenty-first Amendment "does not alter the application of equal protection standards that otherwise govern this case," *Id.* at 209, and invalidated an Oklahoma statute that prohibited the sale of liquor to females under 18 and males under 21 on the ground that it violated those standards. Because freedom of speech is the touchstone of individual liberty, *see, e.g., Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943), the Twenty-first Amendment similarly cannot alter the application of First

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[17] In *Midcal* this Court restated its position that the Twenty-first Amendment is not beyond the reach of the federal commerce power when the state's regulation "squarely conflicts" with regulations imposed by Congress. *Id.* at 109 n.11. *See also Fidelity Federal Savings & Loan Ass'n v. De La Cuesta*, ____ U.S. ____, 102 S.Ct. 3014, 3022 (1982) (standard preemption principles not inapplicable merely because an area of special concern to the state is involved); *Grendel's Den, Inc. v. Goodwin*, 495 F.Supp. 761, 764 (D. Mass 1980), *aff'd*, 662 F.2d 102 (1st Cir. 1981) (en banc), *aff'd sub nom. Larkin v. Grendel's Den, Inc.*, ____ U.S. ____, 103 S.Ct. 505 (1982).

Amendment standards that otherwise govern this case. *Cf. Larkin v. Grendel's Den, Inc.*, ____ U.S. ____, 103 S.Ct. 505, 510 n.5 (1982).

This Court's decisions in *California v. LaRue*, 409 U.S. 109 (1972) and *New York State Liquor Authority v. Bellanca*, 452 U.S. 714 (1981)(per curiam), relied on by the Tenth Circuit, both involved the same type of factual setting—the state's regulation of entities it licenses to sell and distribute liquor within its borders. The state regulations upheld in those cases were designed to control the times, places and circumstances under which liquor was sold and, incidentally, imposed limited restrictions on protected expression. *See Bellanca*, 452 U.S. at 715; *LaRue*, 409 U.S. at 114, 117 & n.4. The Court in *LaRue*, however, specifically noted that its decisions "did not go so far as to hold or say that the Twenty-first Amendment supersedes all other provisions of the United States Constitution in the area of liquor regulations." *Id.* at 115. In *Bellanca* the Court simply applied standards announced in *LaRue* to uphold a New York regulation banning topless dancing in an establishment licensed by the state to serve liquor. *See Bellanca*, 452 U.S. at 717.

Neither *LaRue* nor *Bellanca* dealt with a blanket suppression of protected speech like the Oklahoma advertising ban in this case. The Supreme Court considered this a "critical fact" that permitted the state to impinge incidentally upon constitutionally protected activities. *See LaRue*, 409 U.S. at 118; *Bellanca*, 452 U.S. at 716. When a state's liquor regulation has imposed a blanket ban on protected speech or conduct, as in this case, this Court has not hesitated to strike down the regulation, notwithstanding the Twenty-first Amendment.[18]

In *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980), this Court held that the

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[18] *See, e.g., Doran v. Salem Inn, Inc.*, 422 U.S. 922, 933 (1975). *Doran* involved a First Amendment challenge to a local ordinance which prohibited females from appearing topless not just in bars but in any public place. The Supreme Court agreed with the lower court that the ordinance was far broader than necessary to protect the state's interests. *Id. See New York State Liquor Authority v. Bellanca*, 452 U.S. at 716-717.

Twenty-first Amendment does not bar application of the Sherman Act to California's wine pricing system. The Court found that California failed to sustain the burden of showing that promoting temperance and protecting small retailers were more substantial interests than the national policy favoring competition. Similarly in this case, the District Court found that Oklahoma's blanket advertising ban, when applied to cable programming, served the state's interest in promoting temperance only remotely and ineffectively, if at all.

Under this Court's decision in *Midcal*, the effectiveness of the advertising regulation in advancing Oklahoma's interest must be weighed against its impact on national policy favoring a nationwide communications system and its infringement of Petitioners' First Amendment rights.[19] The Tenth Circuit failed to measure Oklahoma's regulation by that test. Contrary to the Tenth Circuit's decision, the Twenty-first Amendment does not alter the application of constitutional standards under the Supremacy and Commerce clauses and the First Amendment that otherwise govern this case.

II

FEDERAL LAW PREEMPTS THE REGULATION OF CABLE TELEVISION PROGRAMMING AND OKLAHOMA'S REGULATION OF CABLE TELEVISION ADVERTISING IS INVALID UNDER THE SUPREMACY CLAUSE

The Court has directed the Parties to brief and argue the question "[w]hether the state's regulation of liquor advertising, as applied to out-of-state broadcast signals, is valid in light of existing federal regulation of cable broadcasting." ____ U.S. ____ (No. 82-1795) (October 3, 1983).[20] Oklahoma's regu-

[19] "The competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a 'concrete case.'" *Midcal*, 445 U.S. at 110; *see also Craig v. Boren*, 429 U.S. 190, 206 (1976).

[20] "Cable broadcasting" includes, at a minimum, the video programming generally carried by cable systems throughout the country. This programming includes both television signals and other signals such as satellite-delivered national cablecasting program services. *See supra* note 4.

lation of alcoholic beverage advertising, as applied to cable programming, conflicts with federal statutes and regulations and stands as an obstacle to federal policy objectives established by Congress pursuant to powers granted by the Commerce Clause and implemented by the FCC. The Supremacy Clause mandates that federal law preempts Oklahoma's liquor advertising prohibition and renders it invalid as applied to cable television programming.[21]

A. Federal Law Regulates Cable Programming

1. The Communications Act and FCC Policy and Regulations

In *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968), this Court construed the broad statutory grant of authority contained in the Communications Act [22] as conferring on the FCC the power to regulate cable television. In *United States v. Midwest Video Corp.*, 406 U.S. 649, 659 n.17, 662 n.21 (1972) (plurality opinion), the Court, following *Southwestern*, confirmed the FCC's authority to regulate both cable retransmission of television signals and cablecasting.[23]

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[21] *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 109 n.11, 110 (1980).

[22] The Communications Act of 1934, as amended, 47 U.S.C. § 151 *et seq.* (the "Act"), created the FCC for the purpose of regulating "communication by wire and radio so as to make available . . . to all the people of the United States a rapid, efficient, nation-wide and world-wide wire and radio communication service . . . ." 47 U.S.C. § 151. Under § 2(a) of the Act, Congress directed the FCC to regulate all interstate and foreign communication by wire or radio. 47 U.S.C. § 152(a). Moreover, Congress empowered the FCC to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions." 47 U.S.C. § 154(i). Thus, Congress gave the FCC broad authority "to maintain, through appropriate administrative control, [the federal government's] grip on the dynamic aspects of radio transmission." *F.C.C. v. Midwest Video Corp.*, 440 U.S. 689, 696 (1979), *quoting, F.C.C. v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940).

[23] These holdings have been reaffirmed in subsequent cases. *See, e.g., F.C.C. v. Midwest Video Corp.*, 440 U.S. 689, 699 (1979); *Brookhaven Cable TV, Inc. v. Kelly*, 573 F.2d 765 (2d Cir. 1978), *cert. denied*, 441 U.S. 904 (1979).

In fulfilling its role as the " 'single Government agency' with 'unified jurisdiction' and 'regulatory power over all forms of electrical communication, whether by telephone, telegraph, cable, or radio,' " *Southwestern*, 392 U.S. 157, 168 (1968), the Commission has "adopted a subject-matter approach to the allocation of regulatory responsibility over cable television" and has preempted areas of cable regulation "to assure the orderly development of this new technology into the national communications structure." *Report and Order in Docket No. 20272*, 54 F.C.C.2d 855, 863 (1975). The "ultimate dividing line" between federal and state regulation of cable television operations "rests on the distinction between reasonable regulations regarding use of the streets and rights-of-way and the regulation of the operational aspects of cable communications." *Id.* at 861. The Commission allocates primary regulatory responsibility for the former area to the states and their political subdivisions, while reserving the latter for its own regulation. *Id.*

In exercising jurisdiction over the operational aspects of cable communications, the Commission preempts state regulation of television signals carried by cable television companies. "The fact that this Commission has preempted jurisdiction of any and all signal carriage regulation is unquestioned. . . . Franchising authorities do not have any jurisdiction or authority relating to signal carriage." [24] The Commission's preemption of state and local regulation of cablecasting is equally unambiguous. *Community Cable TV, Inc.*, ____ F.C.C.2d ____, FCC 83-525, slip op. at 9-13 (Nov. 15, 1983) ("[T]he Commission has deliberately preempted state regulation of non-basic program offerings, both non-broadcast programs and broadcast programs delivered to distant markets by satellite."); *see also First Report and Order in Docket No. 18397*, 20 F.C.C.2d at 201, 205, 223 & n.28, *clarified*, 20 F.C.C.2d 741 (1969) (state or local regulations inconsistent with federal regulatory policies governing cablecasting are preempted); *Time-Life Broadcast, Inc.*, 31 F.C.C.2d 747 (1971); *Report and Order in Docket No. 21002*, 66 F.C.C.2d 380, 402 n.21 (1977) (state and local authorities preempted

[24] *Clarification of the Cable Television Rules and Notice of Proposed Rulemaking and Inquiry*, 46 F.C.C.2d 175, 178 (1974); *accord, Report and Order in Docket No. 20272*, 54 F.C.C.2d 855, 863 (1975).

"from regulating rates, terms and conditions of pay and other video auxiliary services").[25] The Second Circuit upheld FCC preemption of state regulation of the rates for pay cable programming in *Brookhaven Cable TV, Inc. v. Kelly*, 573 F.2d 765 (2d Cir. 1978), *cert. denied*, 441 U.S. 904 (1979).[26]

The Commission also has detailed rules regulating operation and signal carriage obligations of cable television systems. "All of these rules were adopted with a view toward assuring that the benefits of cable communications become a reality on a nationwide basis."[27] For example, "must-carry" rules require

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[25] *See also Memorandum Opinion and Order and Further Notice of Proposed Rulemaking in Docket No. 21002*, 71 F.C.C.2d 569, 584 n.27. (1979) (noting federal preemption of rates, terms and conditions of video auxiliary services); *Report and Order in Docket No. 20272*, 54 F.C.C.2d 855, 863 (1975); *cf. First Report and Order in Docket No. 19554*, 52 F.C.C.2d 1, 68 (1975) (noting federal preemption of rates and content of subscription programming). "Pay" cable services include those specialized programming services for which a per-program or per-channel charge is made such as Home Box Office (HBO). "Other video auxilary services" include satellite-delivered cablecasting such as the USA Network and Cable News Network which are provided to a cable subscriber. At times these video auxiliary services are packaged together or "tiered" and offered for an extra charge in addition to the basic subscriber rate. The Commission has recently confirmed its preemption of state and local regulation of tiered service rates. *Community Cable TV, Inc.*, _____F.C.C.2d_____, FCC 83-525 (Nov. 15, 1983).

[26] Along with its preemption of cable programming, the Commission has also preempted state regulation of other areas affecting signal transmission. *See, e.g., Earth Satellite Communications, Inc.*, FCC Report No. 2812, Nov. 9, 1983 (state or local regulation of the reception of satellite-delivered signals by satellite master antenna television systems); *Memorandum Opinion and Order in The Second Computer Inquiry*, 84 F.C.C.2d 50, 70, 98 (1980) (operation of customer premises equipment, such as receive-only earth stations); *Report and Order in Docket No. 20018*, 49 F.C.C.2d 470, 479 (1974) (technical standards associated with generation of cable programming signals).

[27] *Report and Order in Docket No. 20272*, 54 F.C.C.2d 855, 865 (1975). Although the Commission has enacted specific regulations governing a cable operator's carriage of television broadcast signals, it has thus far made optional the transmission of cablecast programming. *See First Report and Order in Docket No. 18397*, 20 F.C.C.2d 201, 205, 207-208 (1969); *see also Clarification of the Cable Television Rules*, 46 F.C.C.2d 175, 185-186, 199-

footnote continues

cable operators, under certain conditions, to carry the signals of particular television stations.[28]

When a cable system carries a television signal, either voluntarily or as a "must-carry" obligation, FCC regulations require carrying the signal in its entirety, without deletion or alteration of any part.[29] Both the regulatory history and Commission interpretation emphasize that this rule applies to conventional programs and to advertisements.[30]

2. The Copyright Act of 1976

Section 111(c)(3) of the Copyright Act of 1976, 17 U.S.C. 111(c)(3), part of the statutory compulsory licensing system,[31]

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footnote continued

200, 202 (1974). This does not effect the FCC's preemption of regulation of cable programming. "Federal regulation need not be heavy-handed in order to preempt state regulation." *New York State Comm'n on Cable Television v. F.C.C.*, 669 F.2d 58, 66 (2d Cir. 1982); *accord, Computer and Communications Industry Ass'n v. F.C.C.*, 693 F.2d 198, 217 (D.C. Cir. 1982), *cert. denied*, ____ U.S. ____, 103 S.Ct. 2109 (1983); *see also Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 171-172, 178 (1978); *Brookhaven Cable TV, Inc. v. Kelly*, 573 F.2d 765, 767 (2d Cir. 1978), *cert. denied*, 441 U.S. 904 (1979).

[28] *See* 47 C.F.R. §§ 76.57-.61 (1982). Cable operators in "major" and "smaller" television markets are required to carry, *inter alia*, the broadcast signal of a television station if the cable system is within the "specified zone" (i.e., 35 miles) of the television station or if the station is "significantly viewed" in the community in which the cable system operates. *Id.* § 76.59(a)(1),(6) and §§ 76.61(a)(1),(5). In certain cases where a cable system is located near state boundaries, these mandatory rules often require a cable operator to carry broadcast signals emanating from a neighboring state. *See* JA at 21-23, 35-36.

[29] 47 C.F.R. § 76.55(b) (1983). FCC rules not pertinent here require deletion of certain live sports and duplicating network programming.

[30] *See Garland B. Pugh*, 68 F.C.C.2d 997, 999 (1978); *WAPA-TV Broadcasting Corp.*, 59 F.C.C.2d 263, 272 (1976); *Notice of Proposed Rulemaking and Notice of Inquiry in Docket No. 18397*, 15 F.C.C.2d 417, 444 (1968); *Second Report and Order in Docket No. 14895*, 2 F.C.C.2d 725, 753, 756 (1966).

[31] Section 111 of the Copyright Act provides cable operators with a limited blanket license to retransmit copyrighted material contained in television broadcast signals if the operator complies with FCC signal carriage rules and copyright reporting requirements and makes periodic royalty payments. The compulsory copyright license for cable operators was created by Congress because it was deemed infeasible for cable systems that carry the signals of numerous television stations to attempt to negotiate individual agreements with each of many different copyright owners for the right to carry every program broadcast by each station. *See* H.R. Rep. No. 1476, 94th Cong., 2d Sess. 89, *reprinted in* 1976 U.S. Code Cong. & Ad. News 5659, 5703.

prohibits cable systems' willful deletion or alteration of advertisements from a television signal.[32] The legislative history of this provision demonstrates Congress' intent to create a nationwide scheme of compulsory licensing to accommodate the rights of copyright owners, advertisers, and cable operators. *See* H.R. Rep. No. 1476, 94th Cong., 2d Sess. 93-94, *reprinted in* 1976 U.S. Code Cong. & Ad. News 5659, 5707-08 (Tampering with advertisements harms "the advertiser and, in turn, the copyright owner, whose compensation for the work is directly related to the size of the audience that the advertiser's message is calculated to reach."). Further, Congress recognized the complex problems affecting copyright issues and matters of communications policy,[33] and intended:

> Broadly to proscribe the availability of the compulsory license if a cable system substitutes commercial messages. Included in the prohibition are commercial messages and station announcements not only during, but also immediately before or after the program, so as to insure a continuous ban on commercial substitution from one program to another.

Id. at 94. Accordingly, any willful deletion or alteration of advertisements by a cable system results in loss of the compulsory license, constitutes infringement, and subjects a cable operator to the civil and criminal penalties in the Copyright Act. *See* 17 U.S.C. 501, *et seq.*

B. The Federal and State Regulatory Schemes Are in Direct Conflict and Therefore Oklahoma's Liquor Advertising Ban is Invalid As Applied to Cable Programming

The direct conflict with federal law resulting from the application of Oklahoma's blanket advertising ban to carriage of cable programming is self-evident. Deletion of alcoholic

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[32] *See* PA at 53a.

[33] "[A]ny statutory scheme that imposes copyright liability on cable television systems must take account of the intricate and complicated rules . . . adopted by the Federal Communications Commission . . . ." H.R. Rep. No. 1476, 94th Cong. 2d Sess. 89, *reprinted in* 1976 U.S. Code Cong. & Ad. News 5659, 5703.

beverage advertising, even if it were technically feasible,[34] violates federal communications and copyright law. Deletion of the entire television signal, in certain situations, constitutes a violation of the FCC's "must carry" rules.[35] Deletion of other out-of-state signals, including national cablecasting program services, blocks accomplishment of the Commission's long-standing regulatory goals to increase the public's choice of program services, to provide diversified programming to each of the several states and communities, and to integrate cable television into the national communications system.[36]

Where, as here, there is a direct conflict between state and federal law, this Court has articulated guidelines[37] for deciding when the state law must fall:

> The test of whether both federal and state regulations may operate, or the state regulation must give way, is

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[34] The District Court found that there is "no feasible way for [Petitioners] to block out the advertisements." PA at 4la; *see also* JA at 26, 29, 39; *Cable Television Report and Order*, 36 F.C.C.2d 143, 165 (1972) (proposal to allow commercial substitution by cable operators rejected by FCC as unworkable).

[35] The testimony at the preliminary injunction hearing was that some Oklahoma cable operators are required to carry out-of-state signals which often contain wine advertisements. JA at 22, 35.

[36] This Court has confirmed these regulatory goals. *See F.C.C. v. Midwest Video Corp.*, 440 U.S. 689, 699 (1979); *United States v. Midwest Video Corp.*, 406 U.S. 649, 666-669 (1972) (plurality opinion); *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968); *see also Brookhaven Cable TV, Inc. v. Kelly*, 573 F.2d 765, 767 (2nd Cir. 1978), *cert. denied*, 441 U.S. 904 (1979). Deletion of all out-of-state cable programming would also, as the District Court found, "cause a large but inherently immeasurable reduction in [Petitioners'] subscriber revenue," PA at 42a, thereby jeopardizing the continued financial viability of the cable systems and the fulfillment of the FCC's statutory mandate.

[37] *See Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (federal law preempts state law when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978) (state provision void to the extent that it actually conflicts with a valid federal statute, regulation or policy); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963) (federal preemption inescapable and no inquiry

> whether both regulations can be enforced without impairing the federal superintendence of the field . . . .

Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963). Here, federal and state laws cannot both be enforced without drastically impairing the federal superintendence of the cable programming field.[38] Oklahoma's ban on alcoholic beverage advertising, as applied to cable television programming, must therefore give way.[39]

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footnote continued

into congressional design required "where compliance with both federal and state regulations is a physical impossibility"). *See also Perez v. Campbell*, 402 U.S. 637, 652 (1971) (court looks to the effect, rather than the purpose, of the state regulation); *Jones v. Rath Packing Co.*, 430 U.S. 519, 526 (1977) (court considers "the relationship between the state and federal laws as they are interpreted and applied, not merely as they are written").

These principles have been applied to support federal preemption when state regulation of communications services would interfere with the conduct or development of interstate communications or the achievement of a federal regulatory goal as identified by the FCC. *See, e.g., Computer and Communications Industry Ass'n v. F.C.C.*, 693 F.2d 198, 214-217 (D.C. Cir. 1982), *cert. denied*, ____ U.S. ____, 103 S.Ct. 2109 (1983); *New York State Comm'n on Cable Television v. F.C.C.*, 669 F.2d 58 (2d Cir. 1982); *Brookhaven Cable TV, Inc. v. Kelley*, 573 F.2d 765, 767 (2d Cir. 1978), *cert. denied*, 441 U.S. 904 (1979); *North Carolina Utilities Comm'n v. F.C.C.*, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976); *National Ass'n of Regulatory Utility Comm'rs v. F.C.C.*, 525 F.2d 630, 646 (D.C. Cir.), *cert. denied*, 425 U.S. 992 (1976).

[38] The Oklahoma laws are not saved from preemption ____, because the federal objectives are expressed by an agency. Federal regulations and congressionally approved agency policy have no less preemptive effect than federal statutes. *See Fidelity Federal Savings & Loan Ass'n v. De La Cuesta*, ____ U.S. ____, 102, S.Ct. 3014, 3022 (1982).

[39] In *Dunagin v. City of Oxford*, ____ F.2d ____, No. 80-3762, slip op. at 487 (West Pub. Co. page proof) (5th Cir. October 31, 1983) (en banc), the court found it "exceedingly unlikely" that the State of Mississippi could ban all out-of-state cable signals containing liquor advertisements in the face of, *inter alia*, the Supremacy Clause.

III

OKLAHOMA'S LIQUOR ADVERTISING BAN AS APPLIED TO CABLE PROGRAMMING UNCONSTITUTIONALLY SUPPRESSES COMMERCIAL SPEECH AND OTHER CABLE PROGRAMMING AND IS THEREFORE INVALID

The Tenth Circuit misapplied the four part test established in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980), for evaluating commercial speech regulations. Additionally, it allowed a blanket ban on truthful, non-misleading advertising relating to lawful products and activities contrary to the decisions of this Court.[40] More important, however, the Tenth Circuit failed to apply established First Amendment tests in evaluating the effect of Oklahoma's regulations on cable programming other than wine advertisements.[41]

A. The Tenth Circuit Misapplied the Central Hudson Test

In *Central Hudson* this Court reconfirmed that commercial speech is entitled to First Amendment protection and that a state can regulate such speech only under narrowly defined

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[40] *Central Hudson*, 447 U.S. at 566 n.9; *see also In re R.M.J.*, 455 U.S. 191, 199 (1982); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Carey v. Population Services Int'l*, 431 U.S. 678 (1977); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 773 (1976); *Bigelow v. Virginia*, 421 U.S. 807 (1975).

[41] Cable operators, like publishers and broadcasters, are entitled to protection from unreasonable governmental restraints on their speech by the First and Fourteenth Amendments. *See, e.g., Midwest Video Corp. v. F.C.C.*, 571 F.2d 1025, 1053-1057 (8th Cir. 1978), *aff'd on other grounds*, 440 U.S. 689 (1979); *see also First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978). Similarly, the First Amendment protects the programming, including the advertising, carried by cable operators as well as the operators' editorial function in selecting the programming. *See, e.g., Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 66-67 (1981); *Central Hudson*, 447 U.S. 557 (1980).

circumstances. The Court established a four part test to assess the validity of restrictions on commercial speech.[42]

Both lower courts applied the *Central Hudson* analysis and concluded that the wine commercials retransmitted by Petitioners concerned lawful activity and were not misleading and that the state had a substantial interest in controlling the intemperance of its population.[43] The Tenth Circuit, however, misapplied the *Central Hudson* analysis in answering the questions whether the advertising ban directly advances Oklahoma's asserted interest in temperance and whether the regulation is more extensive than necessary to serve that interest.

1. The State Failed To Prove That Its Liquor Advertising Ban As Applied To Cable Programming Directly Advances Its Interest In The Temperance Of Its Population

Just last term this Court held that "[t]he party seeking to uphold a restriction on commercial speech carries the burden of justifying it." *Bolger v. Youngs Drug Products Corp.*, ____ U.S. ____, 103 S.Ct. 2875, 2882 n.20 (1983); *see also Central Hudson*, 447 U.S. at 570. The District Court found that "[t]here is no evidence before the Court that Oklahoma's ban on advertising is a direct means of preventing alcohol abuse or protecting the health, safety, or welfare of Oklahomans." PA at

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[42] The Court articulated this test as follows:

> At the outset we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than necessary to serve that interest.

Central Hudson, 447 U.S. at 563.

[43] 699 F.2d at 500; PA at 19a-20a, 47a-48a. The Tenth Circuit specifically rejected the state's belated assertion that the advertising at issue is false or misleading and that it concerns unlawful activity. 699 F.2d at 499-500 & nn.7-9; PA at 17a-18a & n.7, 20a & nn.8-9. Both the District Court and the Tenth Circuit held that Petitioners' speech interests were protected by the First and Fourteenth Amendments. 669 F.2d at 500; PA at 17a, 42a.

48a. Nevertheless the Tenth Circuit held, as a matter of law, that Oklahoma's blanket ban satisfies the third part of the *Central Hudson* test.[44]

A regulation suppressing commercial speech "may not be sustained if it provides only ineffective or remote support for the government's purpose." *Central Hudson*, 447 U.S. at 564. In *Bolger* this Court struck down a federal statute that completely prohibited the mailing of unsolicited advertisements for contraceptives. The statutory prohibition failed as a means of effectuating the government's interest under the third part of the *Central Hudson* test. *Bolger*, ____ U.S. ____, 103 S.Ct. at 2884. This Court found that the statute "provides only the most limited incremental support for the [governmental] interest asserted." *Id.* at 2884. That conclusion followed from a recognition that children are already exposed to the subject of contraception via magazine advertisements, publications and sex education courses. As a result, only a "marginal degree of protection" would be achieved by a ban on the unsolicited material. *Id.*

Similarly, in this case, both lower courts recognized that alcoholic beverage advertisements in out-of-state newspapers, magazines and broadcasts are available throughout Oklahoma. 699 F.2d at 493 n.1, 502; PA at 5a n.1, 23a-24a, 45a, 48a. Residents of Oklahoma are exposed to beer advertisements from in-state sources and to a variety of liquor advertisements from sources outside the state, so a cable television advertising ban can have but a minimal effect on liquor sales and consumption.[45] Rather than directly advancing the state's interest, the ban provides "only the most limited incremental support" and a "marginal degree of protection" for that interest. *Bolger*, ____ U.S. at ____, 103 S.Ct. at 2884.

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[44] 699 F.2d at 501; PA at 22a. In relieving the State of its burden of proving a direct relationship between its asserted interest and the advertising ban, the Tenth Circuit relied heavily on the state's power under the Twenty-first Amendment. 699 F.2d at 501; PA at 22a. Reliance on the Twenty-first Amendment to validate a regulation that otherwise would not pass scrutiny under *Central Hudson* is inconsistent with this Court's prior decisions. *See* Part II, pages 11-15, *supra*.

[45] The failure of the state to enforce the advertising ban against national newspapers and magazines or to include within the ban other beverages

footnote continues

Likewise, because the "consumption of alcoholic beverages in Oklahoma has increased substantially in the last twenty years despite the ban on advertising of such beverages," PA at 48a, it is difficult to justify the prohibition on the ground that it promotes temperance. Under such circumstances, deference to legislative conclusions concerning the effectiveness of an advertising ban is not proper. *See California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 112-114 (1980); *Craig v. Boren*, 429 U.S. 190, 200-204 (1976). Consequently, in light of the unsubstantiated state concerns put forward in this case, the Tenth Circuit erred in holding, as a matter of law, that Oklahoma's advertising ban directly advances the state's interest in temperance.

2. Oklahoma's Liquor Advertising Ban Is Far More Extensive Than Necessary To Protect The State's Interest In The Temperance Of Its Population

The District Court found that the advertising ban as applied to Petitioners "is a total prohibition of the dissemination of all information on the subject of alcoholic beverages," that the state had not tried "[a] means less restrictive than blanket suppression," and that the state had not clearly shown "that an absolute prohibition of [liquor] advertising is the only solution." PA at 49a. The court concluded that "the State's attempted regulation [of liquor advertising] is more extensive than necessary to serve the State's interest." *Id.* The Tenth Circuit nevertheless held that the advertising ban is not more extensive than necessary to serve the state's interest. 699 F.2d at 502; PA at 23a-24a. In so holding, the Tenth Circuit once again relieved the state of its burden of justifying the restrictions on Petitioners' commercial speech contrary to this Court's decisions. *See, e.g., Bolger*, ____ U.S. ____, 103 S.Ct. at 2882 n.20; *In re R.M.J.*, 455 U.S. 191,

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containing alcohol (*i.e.*, beer) significantly undermines the plausibility of the state's concern that advertising increases intemperance. Furthermore, the state's failure to enforce the advertising ban against cable operators until now substantially minimizes its contention that wine advertisements on cable television foster the inherent problems that justify their exclusion. *See Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 73 n.14 (1981); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 793 (1978); *see also Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 530-533 (1981) (Brennan, J., concurring in judgment).

206-207 (1982); *Central Hudson*, 447 U.S. at 570; *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 95 (1977).[46]

Contrary to this Court's holding in *Central Hudson*, the Tenth Circuit completely failed to assess the regulations' impact on Petitioners' cable programming other than wine advertisements.[47] In *Bolger* this Court affirmed that a law regulating a commercial activity "must be examined carefully to ensure that

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[46] It is not clear from the record that a more selective approach to regulating alcohol abuse would fail to address the distinctive problems confronting the state (*i.e.*, the health and welfare of its residents, the safety of its highways). Oklahoma has not prohibited the importation or sale of alcoholic beverages within its borders. Such a prohibition would be less restrictive to First Amendment rights than restrictions on advertising or other cable programming. Alternatively, if the state desired to reduce liquor consumption, it could raise taxes on liquor purchases or reduce the hours that liquor retailers may operate and thereby discourage sales; it could step up enforcement of its drunk driving and public intoxication laws; and it could require that a warning of potential health hazards similar to the one now used for cigarettes be placed on each bottle of liquor sold in the state. These alternative measures accomplish the same result (*i.e.*, reduce liquor consumption) and are substantially less intrusive on Petitioners' First Amendment rights. *See, e.g., Schneider v. New Jersey*, 308 U.S. 147, 162 (1939) (state could enforce littering ordinance rather than banning distribution of leaflets).

[47] The Tenth Circuit's holding was based, in part, on the conclusion that Petitioners are free to carry other forms of advertising and that Oklahoma has not eliminated the dissemination of all information concerning alcoholic beverages. 699 F.2d at 502; PA at 23a-24a. These factors are irrelevant. *See Central Hudson*, 447 U.S. at 558-560 (state advertising regulation invalidated despite allowing utility to advertise non-energy related information); *see also In re R.M.J.*, 455 U.S. 191, 193-194 (1982) (advertising ban invalidated despite allowing attorney to advertise some information); *Linmark Assocs., Inc. v. Willingboro*, 431 U.S. 85, 93-95 (1977) (municipal ordinance invalidated despite homeowners having alternative methods of communicating information). Moreover, the state cannot abridge Petitioners' First Amendment rights on the grounds that such rights may be exercised on other non-alcohol related subjects or that other persons are still entitled to speak on the subject. *See Central Hudson*, 447 U.S. at 558-560 (state regulation invalidated although it did not prohibit oil dealers from promoting the sale of energy); *cf. Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 76-77 (1981) (freedom of expression cannot be abridged on plea that it may be exercised in some other place); *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 541 n.10 (1980); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 n.15 (1976).

speech deserving of greater constitutional protection is not inadvertently suppressed." *Bolger*, ____ U.S. ____, 103 S.Ct. at 2880. In analyzing whether the regulation in *Central Hudson* was no more extensive than necessary to serve the state's interest, this Court held that to the extent the state's regulation "suppresses speech that in no way impairs the State's interest," the regulation "violates the First and Fourteenth Amendments and must be invalidated." *Central Hudson*, 447 U.S. at 570; *see also* 447 U.S. at 565 & n.8.

Deletion of wine advertisements from Petitioners' out-of-state cable programming is neither economically nor technically feasible and, as to television signals, violates federal law. PA at 29a, 41a; JA at 23-26, 28-29, 39. Consequently, if Petitioners are required to delete wine commercials from imported cable programming, they will be compelled to discontinue carriage of the entire signal even though it includes an abundance of political and artistic expression and commercial messages for products and services other than alcoholic beverages.[48] The advertising ban is far broader than necessary to protect the state's interest because this programming poses no danger to the state's interest in controlling alcohol abuse within its borders.[49]

B. Oklahoma's Liquor Advertising Regulation Impermissibly Burdens Cable Programming Other than Wine Advertisements

The Tenth Circuit's failure to consider the impact of Oklahoma's regulation on all out-of-state cable programming

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[48] In some cases cable operators required to carry out-of-state broadcast television programming will be forced to cease operations to avoid a violation of the FCC's "must-carry" rules. In other cases cable operators who are no longer able to carry out-of-state cable programming will lose subscribers and will suffer severe, if not fatal, economic losses. *See* JA at 22, 37. More importantly, for those cable operators able to stay in business, the advertising ban will have a "chilling effect" on their future program selection because they will not add new programming services for fear that such services may at some time include liquor advertisements. Such an impact on protected speech is not permitted by this Court's First Amendment decisions. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254, 266, 278-279 (1964); *Smith v. California*, 361 U.S. 147, 150-151 (1959).

[49] *Central Hudson*, 447 U.S. at 565, 570.

that Petitioners bring into the state is a fatal flaw in its decision quite apart from its misinterpretation of *Central Hudson's* analysis of commercial speech. Petitioners have already demonstrated, and the District Court noted, the practical impossibility of cable operators' monitoring incoming cable programming in an attempt to delete alcoholic beverage commercials. The District Court also found as fact that constant monitoring would entail an enormous financial burden. PA at 29a. These constraints exist independently of FCC and Copyright Act prohibitions against signal alteration. Consequently, Oklahoma's statutory scheme, if upheld, would force cable operators to refrain from carrying various out-of-state cable programming that contains an abundance of political and artistic expression, and a wide variety of commercial messages for products and services other than alcoholic beverages, all protected under the First Amendment. *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65-66 (1981); *see First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *Craig v. Boren*, 429 U.S. 190, 206 (1976).

Oklahoma faces an extremely heavy burden in justifying a ban on out-of-state cable programming because of the occasional inclusion of wine advertisements. *See Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 569-570 (1976). For example, no state interest yet identified under the Twenty-first Amendment would compare to the kind of national security interest that might, under appropriate circumstances, justify a temporary ban on cable programming under *New York Times Co. v. United States*, 403 U.S. 713 (1971).

A permanent ban on out-of-state cable programming, the practical issue here, would require a state interest of overwhelming magnitude. In the language of *Shelton v. Tucker*, 364 U.S. 479 (1960):

> The unlimited and indiscriminate sweep of the statute now before us brings it within the ban of our prior cases. The statute's comprehensive interference with [First Amendment] freedom goes far beyond what might be justified in the exercise of the State's legitimate [interest under the Twenty-first Amendment].

364 U.S. at 490. The inevitable overinclusive effect of the Oklahoma regulations is fatal. *See First National Bank of Boston v. Bellotti*, 435 U.S. at 794-95.

This Court in *Schad* reaffirmed that governmental regulation of protected expression must leave open adequate alternative channels of communication. Despite the Borough's assertion that the nude dancing at issue in that case was amply available elsewhere, this Court rejected the contention that a ban on such dancing in the Borough itself was permissible. *Schad*, 452 U.S. at 76-77. Similarly, the availability on Oklahoma cable systems of television stations licensed within that state fails to compensate for Oklahoma's preventing, for all practical purposes, the cable importation of out-of-state programming. Such constriction of available sources of political, cultural and commercial information in the operation of cable systems cannot survive as an " 'incidental' restriction" on expression under *United States v. O'Brien*, 391 U.S. 367, 377 (1968), or as a narrowly drawn regulation of commercial speech within the framework of *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981). Oklahoma's sweeping prohibition of the wide range of expression available on cable programming, simply to avoid messages about alcoholic beverages, far exceeds the range of governmental choice as to commercial speech restrictions that are, in theory, permitted. *Id.* at 512-16. The Oklahoma statutes actually present the question of a flat ban on out-of-state cable programming in a particular medium. While the Court declined to consider the billboard restrictions in *Metromedia* as a flat ban, 453 U.S. at 515 n.20, Justice Brennan, in his concurring opinion, concentrated on the practical effects of the billboard ordinance, perceived a flat ban and condemned it. *Id.* at 525-26. The Oklahoma scheme is unconstitutional under either approach.

CONCLUSION

For the reasons stated above, the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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November 17, 1983

In The
Supreme Court of the United States
October Term, 1983

CAPITAL CITIES CABLE, INC.;
COX CABLE OF OKLAHOMA CITY, INC.;
MULTIMEDIA CABLEVISION, INC.; and
SAMMONS COMMUNICATIONS, INC.,

Petitioners,

v.

RICHARD A. CRISP, DIRECTOR,
OKLAHOMA ALCOHOLIC BEVERAGE
CONTROL BOARD,

Respondent.

No. 82-1795

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MOTION FOR DIVIDED ARGUMENT BY PETITIONERS

Pursuant to Rule 38.4 of the Rules of this Court, petitioners move for permission to divide their allotted one-half hour of argument time so as to allow argument by two counsel. More than one counsel should be heard for the following reasons.

1. This case presents novel and important questions concerning the application of the First Amendment to cable television advertising and programming. In addition, the Court has asked petitioners to brief and present argument concerning the preemptive effect of the federal government's superintendence of the cable field. Twenty cable, broadcast, print media, advertising, civil liberties and civic organizations, plus the Federal Communications Commission, have filed eight briefs *amici curiae*, underscoring the breadth and significance of the issues raised. The petitioners' briefs and those of the *amici* show that diverse interests will be affected in dissimilar ways by the Court's resolution of the issues.

2. Although petitioners' interests are similar, petitioners' counsel differ in their views as to the relative importance of the arguments and the relative emphasis that should be placed on them at oral argument. Petitioners have submitted two separate briefs to this Court on the merits.

3. While the legal arguments presented in the briefs naturally overlap, counsel propose to divide oral argument in a manner that will not result in duplication. If this motion is granted, the time will be divided equally between Dow, Lohnes & Albertson (Brent N. Rushforth), which would present argument on whether the state action has been preempted by federal laws, regulations, and policies, and on the relationship of the Twenty-first Amendment, and Wilmer, Cutler & Pickering (Timothy B. Dyk), which would present argument on the First Amendment issues. Petitioners believe that this proposal will allow for a sharp and orderly presentation of petitioners' views and will not burden the Court with needless repetition.

4. Respondent has authorized us to state that he does not object to this motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of November, 1983, one copy of the "Motion for Divided Argument By Petitioners" was mailed, postage prepaid, to counsel of record for the Respondent, Robert L. McDonald, Esquire, Assistant Attorney General for the State of Oklahoma, 112 State Capital Building, Oklahoma City, Oklahoma 73105. I further certify that all parties required to be served under the rules of the Supreme Court of the United States have been served.

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Supreme Court, U.S.
FILED
DEC 28 1983
ALEXANDER L. STEVAS,
CLERK

NO. 82-1795

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

CAPITAL CITIES CABLE, INC., ET AL.,

PETITIONERS,

VS.

RICHARD A. CRISP, DIRECTOR,
OKLAHOMA ALCOHOLIC BEVERAGE CONTROL BOARD,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF OF RESPONDENT RICHARD A. CRISP, DIRECTOR, OKLAHOMA ALCOHOLIC BEVERAGE CONTROL BOARD

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QUESTIONS PRESENTED

1. Whether federal regulations requiring operators of cable television systems to carry certain programming and forbidding them to edit that programming are unconstitutional on their face under the First Amendment.

2. Whether federal regulations of advertising on cable television which directly conflict with Oklahoma's prohibition of wine advertising are unconstitutional under the Twenty-First Amendment, as applied in this context.

3. Whether the limited protection afforded to commercial speech under the First Amendment outweighs Oklahoma's interest in discouraging the sale and consumption of intoxicating liquor.

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I.

Federal laws and regulations prohibiting cable television operators from altering or deleting the content of television signals (including commercials) which they retransmit to their subscribers, unconstitutionally violate the First Amendment to the United States Constitution by totally prohibiting cable operators from exercising their editorial discretion regarding what programming their cable systems will carry. Because of their facial invalidity, such federal laws and regulations cannot be said to conflict with Oklahoma's liquor advertising restrictions. 19

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II.

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B. Oklahoma's liquor advertising laws preclude federal interfer-ence because liquor advertising is a component of the transportation of liquor for use in the State, over which Oklahoma possesses exclusive regulatory powers under the Twenty-First Amendment, as interpreted by this Court. 29

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III.

When State laws enacted pursuant to the Twenty-First Amendment purportedly conflict with federal laws based on the Commerce Clause, this Court employs a balancing test to determine whether federal or State law prevails, and, on balance, Oklahoma's substantial interest in discouraging the sale and consumption of liquor products far outweighs any federal interest in regulation of cable television under the circumstances presented in this case. 43

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No. 82-1795

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

CAPITAL CITIES CABLE, INC., et al.,

Petitioners,

vs.

RICHARD A. CRISP, DIRECTOR,
OKLAHOMA ALCOHOLIC BEVERAGE CONTROL BOARD,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

BRIEF OF RESPONDENT RICHARD A. CRISP, DIRECTOR, OKLAHOMA ALCOHOLIC BEVERAGE CONTROL BOARD

STATEMENT OF THE CASE

Long before Statehood, the Legislative Assembly of the Territory of Oklahoma enacted a code of laws regulating the sale, manufacture and distribution of alcoholic

beverages. Initially, traffic in all malt, spirituous or vinous, or any other intoxicating liquors was prohibited without express territorial permission. Okla. L. 1890, c. 48, § 6, p. 654. Licenses were issued to sell liquor only for restricted industrial, pharmaceutical and scientific endeavors, upon petition, display of reputable character and posting of a $2,000 bond. Okla. L. 1890, c. 48, § 1, p. 653-4. Further, prohibitions were enacted against the sale or distribution of liquor to minors, and insane or intoxicated persons, Okla. L. 1890, c. 48, §§ 8, 10, p. 655; selling liquor on Sunday or election day, § 14, p. 656; gambling, § 23, p. 659; or obstructing windows or doors where sold, § 25, p. 659. A cause of action was allowed against the illegal provider of such spirits where a person of intemperance became a charge of the county

or city, § 16, p. 656; and a remedy was provided the unforunate family of that charge, through which a convicted provider could be fined $500 per offense by civil action, § 15, p. 656.

When Oklahoma was authorized by Congress to enter the Union, Oklahoma Enabling Act of June 16, 1906; 34 Statutes at Large, p. 267, She was expressly enjoined, as a condition of Statehood, to prohibit by State law all traffic and commerce in intoxicating liquor, <u>including advertising</u>, for a period of twenty-one years, at least in that portion of the State which had previously been Indian Territory. Oklahoma Enabling Act, supra, § 3 (Second). In obedience to this dictate of Congress, the Oklahoma Constitutional Convention included the Prohibition Ordinance in the draft Constitution submitted to and approved by the people of

the State. It was drafted to include the entire State, rather than just Indian Territory, and prohibition of liquor, including its advertisement, became part of the fundamental law of the State.

Thereafter, the Legislature began to build a progressively more comprehensive structure of liquor regulations and restrictions, the vestiges of which are still readily apparent today in the Oklahoma Statutes. A State agency was soon created to purchase liquor for all legitimate purposes. Okla. L. 1907-8, c. 45, Art. I, § 3983, p. 883. In the same legislation, a section entitled "Prohibition" was enacted, making it unlawful for any individual or entity to:

> "[M]anufacture, sell, barter, give away, or otherwise furnish except as in this act provided, any spirituous, vinuous, fermented or malt liquor . . . which contain as much as one-half of one per centum of alcohol . . . capable of being used as a

> beverage, . . . or to solicit the purchase or sale of any such liquors, either in person or by sign, circular, letter, card, price list, advertisement or otherwise, or to distribute, publish or display any advertisement, sign or notice where any such liquor may be manufactured, bartered, sold, given away or otherwise furnished." § 4007, p. 887. (Emphasis added)

In 1926, the Legislature attacked the lucrative moonshining business, requiring all legal stills to be registered. Okla. L. 1926, Art. II-A, §§ 7039-8, 7039-9, pp. 656-7. The general advertising prohibition was repeated but with specific reference to stills for purchase. Id., § 7039-10, p. 657.

By 1931, the Legislature had developed an entire article dedicated to procedures for enforcement of liquor regulations, disposition of contraband, warrants, searches, and seizures. Okla. L. 1931, Art. V. In 1933, by constitutional amendment, importation of alcoholic beverages

into the State in contravention of its laws was prohibited. Okla. Const. Art. 21, § 2.

Subsequently, by special election, the first legal distinction between malt beverages and other liquor was made whereby any beverage containing over 3.2% alcohol was declared to be intoxicating and those beverages under 3.2% nonintoxicating. Okla. L. 1934, ch. 16, Art. III, § 2607, p. 150. With that distinction came an even more elaborate system of control of the industry. At this point the people of Oklahoma exhibited their continued concern over the potential for abuse of alcoholic beverages and made the prohibition against liquor advertising thereafter applicable only to intoxicating beverages. § 2618, p. 163.

The next twenty-five years produced only minor modifications of the methods

and procedures of liquor regulations. However, in the summer of 1959, and with an air of great caution, the people of Oklahoma voted to repeal liquor prohibition. The resulting amendment to the Oklahoma Constitution stands intact today in Oklahoma. Okla. Const. Art. 27.

Ten sections comprised Article 27, thereafter referred to as the Alcoholic Beverage Control Amendment. Open saloons, i.e., sales of liquor by the drink, were prohibited, as were sales of alcoholic beverages to minors, inebriates and insane persons, §§ 1, 4 and 5; sales were restricted to only certain days, § 6. Taxation was authorized as was the distribution of the funds collected, § 7. State and political subdivisions were ordered to stay out of the liquor business, § 8; and licensees were limited to noncorporate entities or persons, having continued

residence in Oklahoma for ten (10) years, who had neither violated any law related to liquor nor been convicted of any felony, § 10.

The people of Oklahoma also once more determined the prohibition of advertising was of constitutional import. Section 5 of that Amendment, at issue in this case, stated, in pertinent part:

> "It shall be unlawful for any person, firm, or corporation to advertise the sale of alcoholic beverage within the State of Oklahoma, except one sign at the retail outlet bearing the words 'Retail Alcoholic Liquor Store.'"

Article 27 has remained unaltered since that time. The Legislature immediately enacted the Oklahoma Alcoholic Beverage Control Act to reflect the constitutional mandate. 37 O.S.Supp.1959, ch. 3. That chapter, with little substantive change, remains the law in Oklahoma.

A prohibition of substantially all advertising of intoxicating liquor, then, existed in Oklahoma prior to Statehood. Continuance of the prohibition was even forced upon Oklahoma by Congress as a condition of Statehood, for a period of at least twenty-one years, and has remained a part of the fundamental law of the State ever since.

Currently, in Oklahoma, wine and spirits, by definition, fall within the scope of the advertising ban. 37 O.S.1981, § 506(3). Advertising of strong beer, i.e., any beer in excess of 3.2% alcohol, is also included. All containers of such beer must properly display the alcohol content and are not to be promoted by advertisement if in excess of 3.2%. Id., § 540(b).

In 1980, the Oklahoma Attorney General, in response to a formal inquiry,

issued an opinion stating that retransmission of out-of-state liquor commercials by cable television operators operating in Oklahoma would be deemed a violation of State law. Oklahoma Attorney General Opinion No. 79-334 (March 19, 1980). Respondent Crisp, pursuant to said opinion, notified Oklahoma cable operators that they were in violation of § 516 and subject to prosection.

Petitioners operate cable television systems in Oklahoma. Depending on how the radio signals are received by Petitioners, they are regulated by certain FCC or copyright law provisions.

Petitioners herein make no claim that they receive any direct financial gain from the advertisements retransmitted by them. (Preliminary Injunction, p. 46). Nor do they indicate that monitoring and

deletion of those advertisements is impossible, asserting instead that it would be impractical to delete such advertising (J. A. p. 39). Presumably, this must simply mean that such deletion would cost them more than they wish to pay.

SUMMARY OF ARGUMENT

I

The provisions of the federal copyright law and Federal Communications Commission's regulations, which prohibit the deletion or alteration of broadcast signals retransmitted by cable operators, unconstitutionally interfere with cable operators' First Amendment rights to edit their program content. Accordingly, such federal laws are void and thus cannot be said to conflict with existing Oklahoma laws prohibiting liquor advertising.

II

Oklahoma laws regulating liquor advertising are a valid exercise of its Twenty-First Amendment powers, notwithstanding federal copyright and communications regulations with which such prohibition may conflict. This is consistent with the history and language of the Twenty-First Amendment as well as this Court's interpretation of that amendment. Oklahoma's power to regulate liquor advertising precludes federal regulatory interference because liquor advertising is one of the incidents in the sale of liquor which Oklahoma may totally prohibit and Oklahoma's laws were enacted to protect the health and welfare of her citizens against the evil incident to intoxicants. State liquor regulatory activity which directly serves this substantial State interest should not be infringed upon by federal

laws governing cable television even though such federal laws purportedly conflict with the State liquor laws.

This Court has held that when State laws enacted pursuant to the Twenty-First Amendment purportedly conflict with federal laws based on the Commerce Clause, a balancing test is employed to determine whether federal or State law prevails. Here, Oklahoma's overwhelming concerns for the health and welfare of its citizens substantially outweigh the opposing federal interest in fostering "Rapid, efficient, nationwide, and world-wide wire and radio communications service," and in the protection of liquor commercial copyrights.

Contrary to what Petitioners assert, neither the Communications Act nor the Copyright Act totally preempt the field of cable television regulation so as to

prohibit States from exercising their Twenty-First Amendment powers. Furthermore, to the extent that a Supremacy Clause question is nonetheless presented by virtue of the asserted conflict between such federal laws and Oklahoma's liquor advertising prohibition, a traditional preemption analysis is not applicable. Rather, a balancing of the federal and State's interest is necessary to resolve the issues before the Court. On balance, Oklahoma's substantial interest in discouraging the sale and consumption of liquor, by prohibiting liquor advertising, far outweighs any federal interest in the regulation of cable television present in this case.

III

The First Amendment aspects of this case present a narrow question of first impression before this Court. At issue is

whether a sovereign State may pursue public policy of discouraging the use of intoxicating liquor products, by prohibiting the advertisement of such products on cable television, in the absence of total prohibition of commerce in such products, and notwithstanding the limited, though substantial, constitutional protection afforded commercial speech under the First Amendment of the United States Constitution.

The advertising in question is delivered directly into the homes of the residents of the State through their television receivers. All such advertising originates outside of Oklahoma, and none of it deals specifically with the price or availability of liquor products within the State. The arguments of the Petitioners concede that the object of each individual advertisement is to increase the use and

consumption of the particular product represented, that is, to encourage its use.

Because the State's regulation is limited in application to a segment of the commerce in liquor products, it is entitled to a certain presumption in favor of its validity by virtue of the enhancement of the State's police power regulatory authority by operation of the Twenty-First Amendment. Balanced against this enhanced regulatory power are the interests of liquor advertisers and consumers, which, at best, lie at the very periphery of First Amendment concerns.

The First Amendment protection for these wine advertisements is, first, substantially attenuated because messages and information delivered directly into homes, unsolicited, and by electronic means, have always held a subordinate position on the scale of First Amendment values. Further,

various factors which have compelled protection of commercial speech in a variety of other circumstances are absent here. For example, the products here involved are not necessities in the same sense as prescription drugs, legal services or contraceptives might be deemed to be. Further, as the advertisements in question are devoid of price information, their relevance to informed economic decision making is marginal, at best.

Each of these factors, which serve to attenuate the degree of First Amendment protection to which these wine advertisements are entitled, proportionally enhances the degree of deference which should be afforded to the judgment of the people of Oklahoma that promotion of the sales of such products ought to be discouraged. Consequently, when the necessary balancing of the conflicting

constitutional interests is carried out within the framework provided by Central Hudson Gas & Elec. Corp. v. Public Service Comm., 447 U.S. 557 (1980), it must be concluded that, in this context, Oklahoma's prohibition of liquor advertising is valid and enforceable. Finally, the Petitioners' objections that Oklahoma's prohibition of liquor advertising, if enforced, will cause them to abaondon the program channel which include such advertising, thus serving to suppress expression other than such advertising, is simply not supported by the record. Therefore, the decision of the Tenth Circuit Court of Appeals should not be disturbed.

ARGUMENT

I. **Federal laws and regulations prohibiting cable television operators from altering or deleting the content of television signals (including commercials) which they retransmit to their subscribers, unconstitutionally violate the First Amendment to the United States Constitution by totally prohibiting cable operators from exercising their editorial discretion regarding what programming their cable systems will carry. Because of their facial invalidity, such federal laws and regulations cannot be said to conflict with Oklahoma's liquor advertising restrictions.**

As Petitioner Cox points out at page 5 of its Brief, federal laws prohibit cable television operators from altering the content of the television signals (including commercials) that they transmit to their subscribers. Section 76.55(b) of the FCC's rules, 47 C.F.R. § 76.55(b) (1982), requires that television programming transmitted by cable system "shall be carried in full, without deletion or

alteration of any portion." Additionally, Section 111(c)(3) of the Copyright Act of 1976, 17 U.S.C. § 111(c)(3) expressly prohibits cable operators from willfully deleting a commercial advertisement from a television signal.

Petitioners, in seeking to avoid the dictates of Oklahoma's restrictions on liquor advertising, argue that they may not delete liquor advertising from their signals because of these federal laws. Reliance on these laws and regulations is, however, misplaced, as both the Federal Communications Commission's regulations and the Copyright Act's provisions violate the provisions of the First Amendment to the United States Constitution by totally eliminating cable operators' editorial function relating to the choice of programming which they carry.

As Capital Cities Cable admits, on page 33 of their Brief, various courts have held that the First Amendment protects cable operators' editorial choices in programming. See, e.g., Home Box Office, Inc. v. FCC, 567 F.2d 9, 43-51 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977); Community Communications Co. v. City of Boulder, 660 F.2d 1370, 1376 (10th Cir. 1981), cert. dismissed, 102 S. Ct. 2287 (1982); Midwest Video Corp. v. FCC, 571 F.2d 1025, 1053-56 (8th Cir. 1978), aff'd on other grounds, 440 U.S. 689 (1979); Cruz v. Ferre, No. 83-330-CIV-WMH (S.D. Fla. August 2, 1983); Community Television of Utah, Inc. v. Roy City, 555 F. Supp. 1164 (D. Utah 1982); Home Box Office, Inc. v. Wilkinson, 531 F. Supp. 987 (D. Utah 1982).

In FCC v. Midwest Video Corp., 440 U.S. 689, 707 (1979), this Court recognized that cable operators have "a significant amount of editorial discretion regarding what their programming will include." In that case, this Court struck down FCC regulations that required cable operators to set aside certain channels for leased public access, and in so doing recognized that cable operators share with broadcasters a significant amount of editorial discretion, stating:

> ". . . Cable operators now share with broadcasters a significant amount of editorial discretion regarding what their programming will include. As the Commission, itself, has observed, 'both in their signal carriage decisions and in connection with their origination function, cable television systems are afforded considerable control over the content of the programming they provide.' Report and Order in Docket No. 20829, 69 F.C.C.2d 1324, 1333 (1978)." Id., 440 U.S. at 707.

The federal regulations and statutes relied upon by Petitioners to shield themselves against Oklahoma's restriction on liquor advertising completely negate the cable operators' editorial discretion -- both the regulations and the statute require that all television programming retransmitted be carried in full without deletion or alteration of any portion, including commercial advertisements.

This federally imposed elimination of the cable operators' editorial discretion makes cable operators mere passive receptacles or conduits of the programming signals transmitted to their subscribers. As such, the federal regulations and statutes violate First Amendment rights of the cable operators, and therefore are unconstitutional; this being the case, the restrictions are void and may not properly

be used as a shield to protect the operators from compliance with Oklahoma's restrictions on liquor advertising. E.g., Richardson v. United States, 465 F.2d 844 (3d Cir. 1972), cert. denied, 410 U.S. 955 (1973), cert. granted, 410 U.S. 953, reversed on other grounds, 418 U.S. 166; and Gary v. Spires, 473 F. Supp. 878 (D. S.C. 1978).

However, even if the federal statute and regulations in question were constitutional, such would not require that Oklahoma's prohibition of liquor advertising be struck down. Rather, the State's Twenty-First Amendment interests have to be balanced against the federal interests involved. As discussed in the following proposition, the State's interest in protecting its citizens from the evils incident to the liquor traffic far outweighs

the limited federal interest in this arena.

II. The Twenty-First Amendment and the State's historical authority over liquor sales within its borders should, in this case, be construed to permit Oklahoma to exercise that authority over liquor advertising without federal interference.

A. Oklahoma's laws regulating liquor advertising are a valid exercise of its Twenty-First Amendment powers and insofar as federal copyright laws and FCC regulations attempt to intefere with that authority, they are unconstitutional, as applied.

The Twenty-First Amendment is totally unique in the constitutional scheme in that it represents the only express grant of federal constitutional power to States. California v. LaRue, 409 U.S. 109 (1972). In other areas of State legislation or regulation, State power is ordinarily presumed to be limited by the Supremacy

Clause in the federal Constitution. United States Constitution, Article IV, § 2. However, State laws regulating the sale of intoxicating liquors possess a different constitutional status than other types of State regulation, and any analysis of the validity of Oklahoma's laws regulating liquor advertising where federal laws purportedly conflict may not proceed via a traditional preemption or Supremacy Clause analysis. Rather, any such anaylsis must begin with a presumption of State power, keeping in mind that where intoxicating liquors are concerned, the Twenty-First Amendment requires that great deference must be accorded to a State's regulatory efforts. Castlewood Intern. Corp. v. Simon, 596 F.2d 638 (5th Cir. 1979), vacated and remanded, 446 U.S. 949 (1980), panel opinion reinstated, 626 F.2d 1200 (5th Cir. 1980). Such regulations

should also ordinarily be free from federal interference. Castlewood, supra. While the States have broad authority to regulate alcoholic beverages under their traditional police powers standing alone, Wisconsin v. Constantineau, 400 U.S. 433, 436 (1971), "the broad sweep of the Twenty-First Amendment has been recognized as conferring something more than the normal state authority over public health, welfare, and morals." California v. LaRue, 409 U.S. 109, 114 (1972).

There is no doubt that this was the purpose of the Twenty-First Amendment. As originally proposed, the Amendment contained three substantive sections, the third of which provided:

> "Congress shall have concurrent power to regulate or prohibit the sale of intoxicating liquors to be drunk on the premises where sold." 76 Cong. Rec. 4138 (1933).

This third section was deleted because of concerns that it could be utilized to deprive the States of the power granted to them by the second section. As Senator Wagner pointed out, "We have expelled the system on national control through the front door . . . and readmitted it forthwith through the back door of Section 3." 76 Cong. Rec. 4145 (1933). The Amendment, therefore, was passed with only two sections. The first section repealed the Eighteenth Amendment which had established national prohibition, and the second, crucial here, specifies that:

> "The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

The history and language of the Twenty-First Amendment makes it clear that Congress intended to give total control of commerce in liquor within their boundaries

to the States, while denying the same to the federal government. The power conferred upon the States by the Twenty-First Amendment has over the years been interpreted broadly, and has not been viewed as limited to importation and transportation of intoxicating liquors. Rather, the power to regulate has consistently been held to include all aspects of commerce in liquor. Thus, if the advertising of liquor products may properly be considered a component of liquor commerce within Oklahoma, it follows that the State's prohibition of such advertising falls at the center of Oklahoma's special regulatory prerogatives under the Twenty-First Amendment.

B. Oklahoma's liquor advertising laws preclude federal interference because liquor advertising is a component of the transportation of liquor for use in the State, over which Oklahoma possesses exclusive regulatory powers under the Twenty-First Amendment, as interpreted by this Court.

This Court has consistently intrepreted the State's Twenty-First Amendment powers expansively. California Retail Liquor Dealers Association v. Midcal Aluminum, 445 U.S. 97 (1980); Ziffrin, Inc. v. Reeves, 308 U.S. 132 (1939); State Board v. Young's Market Co., 299 U.S. 59 (1936). In Ziffrin, this Court stated that:

> "A State may protect Her people against evil incident to intoxicants . . . and may exercise large discretion as to the means employed." Id., at 138-139.

The means employed here by Oklahoma, that is, prohibiting liquor advertising on cable television, are directed at protecting Her people from the evil incidents of intoxicants and should not, in the absence of a direct and substantial federal interest requiring such result, be infringed upon by federal laws governing cable television, which were enacted by Congress and its agencies under the Commerce Clause,

supra, or the Copyright Clause, United States Constitution, Article I, § 8, cl. 8.

In State Board v. Young's Market Co., supra, this Court rejected the plaintiff's/wholesaler's contention that a State statute discriminated against the wholesalers of imported beer and thus violated the Commerce Clause, stating that:

> "States are totally unconfined by traditional Commerce Clause limitations in restricting the importation of intoxicants."

Likewise, in Midcal, supra, this Court, in interpreting State Board, supra, and its progeny, and quoting from Ziffrin, supra, stated:

> ". . . In terms, the Amendment gives the States control over the 'transportation or importation' of liquor into their territories. Of course, such control logically entails considerable regulatory power not strictly limited to importing and transporting alcohol." Ziffrin, supra, at 138.

Implicitly then, this Court has recognized that a State's regulation of liquor sales necessarily encompasses the regulation of advertising which leads to liquor sales. Midcal, supra. This is consistent with the liquor advertisement decisions of other courts, which have recognized that liquor advertising is an incident of liquor sales:

> "Advertising is one of the incidents in the sale of liquours. If the state, under its police power, can prohibit the whole business from being carried on, it can prohibit and control any of its incidents. The prohibition against certain forms of advertising is really a prohibition against soliciting in the last analysis." Premier Pabst Sales Co. v. State Board of Health, 13 F. Supp. 90, 95, 96 (S.C. Cal. 1935). (Emphasis added)

The propriety of treating advertising as an incident or component of the commerce in liquor is also borne out by several studies which have examined the impact of alcohol advertisements and their relationship to increased consumption.

One recent study was "Content and Effects of Alcohol Advertising Report of Michigan State University Study." The study was sponsored by the Bureaus of Alcohol, Tobacco and Firearms, Federal Trade Commission, National Institute on Alcohol Abuse and Alcoholism, and Department of Transportation. In comparing the responses of two groups: those highly exposed to alcohol adverstisements versus those lightly exposed, the study noted that:

> ". . . Thirty-three percent of the highly exposed to 16% of the lows said they had at least five or six drinks at a sitting at least one day a week (1,7). The heavily exposed had gotten into trouble because of drinking more often than the lightly exposed (2, p.19). . . ."

Hence, because liquor advertising apparently does stimulate liquor use, it may properly be regarded as a component of the transportation and delivery of such liquor products within Oklahoma. Therefore, this

Court should continue its broad interpretation of the Twenty-First Amendment and uphold Oklahoma's liquor advertising laws, because advertising is part of the sale of liquor, which may be regulated by the State under its Twenty-First Admendment powers.

C. Oklahoma's laws prohibiting liquor advertising serve the State's clear and legitimate interest in protecting the health, welfare, temperance and safety of its citizens by discouraging the sale and consumption of intoxicants, and such laws are, therefore, properly within Oklahoma's special powers under the Twenty-First Amendment.

Under Section 2 of the Twenty First Amendment, Oklahoma has the power to totally prohibit the sale of liquor within its boundaries. New York State Liquor Authority v. Bellanca, 452 U.S. 714 (1981) (per curiam); Ziffrin, Inc. v. Reeves, 308 U.S. 132 (1939). Oklahoma also has the

concomitant power to regulate the times, places, and circumstances under which liquor may be sold. Bellanca, supra, 452 U.S. at 715. Moreover, within the power conferred by the amendment, Oklahoma may protect Her people against evil incident to intoxicants by prohibiting the advertising of such intoxicants. Ziffrin, supra, at 138-139. Such prohibition is part of a comprehensive regulatory liquor scheme.

Under this scheme, Oklahoma regulates the importation, wholesale and retail distribution of liquor throughout the State. This regulation is pervasive. See, Okla. Const. Art. 27; 37 O.S.1981, §§ 501-575 (ch. 3). Oklahoma also regulates the time, place and manner in which retail liquor may be sold at licensed "package stores." Open saloons are unlawful and private clubs are restricted both in their

manner and time of distribution of liquor. Consumption of liquor in any public place is unlawful in Oklahoma. Additionally, sale of liquor at any level is permitted at the exclusive sufferance of the State of Oklahoma, such permission being granted by a comprehensive licensing system. This complex and pervasive regulatory scheme was enacted within the State's broad powers under the Twenty-First Amendment and, as such, must be accorded great deference when, as here, interference with federal regulations is encountered.

Oklahoma's regulatory scheme serves a legitimate interest of the State -- that of protecting its citizens against the dangers and evil of alcohol consumption and abuse by discouraging the sale and consumption of liquor products. Alcohol abuse and alcohol related problems,

including related deaths, personal disability, crime, health impairment, and family disruptions are a significant problem in Oklahoma as documented in the study, "Alcohol Abuse in Oklahoma," Kerr Foundation, 1979. Significantly, the fastest growth by far in alcohol consumpton in Oklahoma has been of malt beverages, which are, under Oklahoma law, permitted to advertise. See, Okla. Const. Art, 27, § 2; Kerr Report, supra at Table 1, p. 9.

In enacting its constitutional and statutory provisions prohibiting liquor advertising, Oklahoma has accepted its responsibility to protect the health and welfare of its citizenry from the problems associated with the use of intoxicating liquor. The advertising prohibition is express and unambiguous. By these laws, Oklahoma has sought to prevent the artificial stimulation of the use of alcohol by

its citizens. Oklahoma's people and Legislature have always understood that liquor advertising bears a direct relationship to the attendant public health problems that inexorably accompany use of intoxicating liquors. The specific public health harm caused by the use of intoxicating liquors, which harm Oklahoma argues is increased directly, indeed statistically, by the commercial advertising of liquor, includes but is not limted to physiological harm, e.g., coronary heart disease, cirrhosis of the liver, and gastrointestinal cancer. The existence of a substantial State interest in discouraging the sale and consumption of intoxicating liquors in Oklahoma cannot be denied.

The Circuit Court in the Opinion Below properly recognized the substantial State interest involved, and following this Court's interpretation of State powers

under the Twenty-First Amendment properly upheld Oklahoma's alocholic beverage advertising prohibitions on two separate grounds:

> "First, the purpose of the advertising here unquestionably is to encourage sales of alcoholic beverages. As such, the advertising could be considered an incident of the sale of liquor which the state may regulate as it regulates sales themselves . . . . Alternatively, the laws are justified as one of the means, selected by an exercise of its broad discretion, by which Oklahoma has chosen to achieve the proper goal of protecting its people against the hrams incident to the use of alcoholic beverages." Cable-Com General, Inc. v. Crisp, 699 F.2d 490 (10th Cir. 1983).

These conclusions are consistent with the action by the Court when, just last term, this Court dismissed, for want of a substantial federal question, the appeal in Queensgate Investment Co. v. Liquor Control Comm., ___ U.S. ___, 103 S. Ct. 31 (1982). The Court of Appeals, in the Opinion Below, recognized the significance of the Queensgate decision, saying:

"In Queensgate Investment Co. v. Liquor Control Commission, 69 Ohio St.2d 361, 433 N.E.2d 138 (1982), the appellant, Queensgate Investment Co. (Queensgate), was a holder of an Ohio Liquor permit who was prosecuted for the violation of certain regulations of the Ohio Liquor Control Commission. the regulations in question prohibited off-premises price advertising by holders of certain liquor permits. The Commission rendered an order suspending Queensgate's license for one week for the violation of the regulation. Queensgate appealed on several grounds, including a contention that the regulation was an unconstitutional restraint on its First Amendment right to engage in commercial speech.

"The Ohio Supreme Court held that the asserted governmental interest, that of discouraging the excessive consumption of alcoholic beverages, was substantial and was well within the powers granted to the states under the Twenty-First Amendment. The court then held that since it was directed at controlling alcoholic beverages, not speech, the regulation did directly advance the governmental interest. Finally, the court held that the advertising of drink prices and price advantages would encourage the excessive consumption of alcoholic beverages; thus, the prohibition against such advertising was the narrowest method available to prevent such excessive consumption. Queensgate, supra at 69 Ohio St.2d 365-67, 433 N.E.2d 138.

"Queensgate filed a timely appeal in the United States Supreme Court. The only issue it raised there was whether the regulation violated the 'First and Fourteenth Amendments of the Constitution of the United States by suppressing the public dissemination of truthful information about a lawful activity.' Jurisdictional Statement at 1, Queensgate Investment Co. v. Liquor Control Commission, ___ U.S. ___, 103 S.Ct. 31, 74 L.Ed.2d 45. The Liquor Control Commission filed with the Supreme Court a motion to dismiss the appeal on the ground that the question was so unsubstantial as not to warrant further argument. The basis for the motion was that an advertising prohibition was well within the scope of a state's powers under the Twenty-First Amendment, which permits a state to totally ban the sale of liquor, or otherwise 'minimize its evils.'

"On October 4, 1982, the Supreme Court dismissed the appeal 'for want of a substantial federal question,' Queensgate Investment Co. v. Liquor Control Commission, ___ U.S. ___, 103 S.Ct. 31, 7 L.Ed.2d 45 (1982).

* * * *

"In our view, Queensgate manifestly presented an issue concerning the First and the Twenty-First Amendments. The Supreme Court arguably may have decided the case on non-constitutional grounds; if so, however, we cannot discern them. It is our view that the Supreme Court decided Ohio's regulation was not an unconstitutional

> infringement on the appellant's First Amendment rights." (Footnotes omitted.) Cablecom-General, Inc. v. Crisp, 699 F.2d 490, 494-495, 497 (10th Cir. 1983).

As the Court of Appeals correctly realized, this Court, in Queensgate, recognized that prohibition of liquor advertising is within a State's Twenty-First Amendment powers, notwithstanding the presence of substantial federal interests arising under the First Amendment. Likewise, Congress' ability, under the Supremacy Clause, supra, to interfere with the exercise of such a State regulatory power is severely limited to very particular circumstances, which, as discussed in the next proposition, are not present in this case.

III. When State laws enacted pursuant to the Twenty-First Amendment purportedly conflict with federal laws based on the Commerce Clause, this Court employs a balancing test to determine whether federal or State law prevails, and, on balance, Oklahoma's substantial interest in discouraging the sale and consumption of liquor products far outweighs any federal interest in regulation of cable television under the circumstances presented in this case.

When a State law, enacted pursuant to the extraordinary regulatory power under the Twenty-First Amendment, is said to conflict with some act of Congress or federal regulation, the ordinary principles of preemption relied upon by the Petitioners under the Supremacy Clause, United States Constitution, Article VI, Clause 2, do not apply. Instead, any analysis of a contention that Okahoma's jurisdiction to regulate liquor advertising on cable television has been preempted by the federal

Communications Act, 47 U.S.C. §§ 151-609, and the federal Copyright Act, 17 U.S.C. § 111(c)(3), must begin by recognizing that the validity of this claim cannot be judged upon the usual basis of broad statements about the "comprehensive" nature of the regulations under those federal Acts. Rather, in determining whether State laws enacted under the Twenty-First Amendment are subject to federal preemption, this Court has developed a balancing test. Midcal, supra; Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324 (1964). Thus, a traditional preemption analysis is not applicable here.

The Petitioners argue that where there is direct conflict between State and federal law, ipso facto, the State law must fall, citing Hines v. Davidowitz, 312 U.S. 52 (1941); Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978); and Florida Lime &

Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963). This may be true in an ordinary case not arising under the Twenty-First Amendment. However, because the cases relied upon by the Petitioners for their Supremacy Clause arguments do not involve regulation of any aspect of liquor traffic, the ordinary mode of Supremacy Clause analysis employed in such cases, under which a conflicting State law must surely fail, is not applicable in the case at bar.

In Hostetter, supra, acknowledging that both the Twenty-First Amendment and the Commerce Clause are parts of the same Constitution, this Court ruled that "Like other provisions of the Constitution each must be considered in light of the other, and in the context of the issues and interests in any concrete case." Id., at 332. Thus, this Court has long expressly

recognized that a balancing of interests is necessary in cases of conflicting constitutional interests such as those presented here. This recognition is directly reflected in the analytical model utilized by this Court in resolving a similar conflict presented in the case of California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., supra.

In Midcal, supra, a California wine wholesaler had challenged the State's wine pricing scheme claiming a violation of the Sherman Act. California asserted that this regulatory scheme was protected by § 2 of the Twenty First Amendment. This Court invalidated the wine pricing scheme, but only after finding that the federal policy in favor of competition outweighed the State's asserted interests in liquor price maintenance -- the promotion of temperance and the preservation of small

retail establishments. Significantly, the Court in Midcal relied upon a finding by the California Supreme Court that the State's liquor pricing scheme did not inhibit the consumption of alcohol in that State. Id., 445 U.S. at 113.

Consequently, the issues before this Court may only be resolved by balancing Oklahoma's overwhelming concerns for the health and welfare of its citizens against the federal interests arising under the Communications and Copyright Acts, supra. Therefore, an examination of federal regulation of the cable television field under these Acts is necessary to determine if, in fact, such regulations and statutes may constitutionally prevent Oklahoma from exercising its Twenty-First Amendment powers under the circumstances of this case.

A. Communications Act of 1934

The Federal Communications Commission derives its regulatory authority from the Communications Act of 1934, 47 U.S.C. §§ 151 et seq. The Act does not expressly provide for regulation of cable television, as the Act preceded the development of that medium. However, this Court in United States v. Southwestern Cable Co., 392 U.S. 157 (1968), broadly construed the authority granted in the Communications Act as conferring upon the Commission the power to regulate cable television. That power is not absolute; it is limited to acts "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." Id., 392 U.S. at 178. But, denial to a State of the right to exercise its Twenty-First Amendment powers by regulating liquor

advertising does not appear to be reasonably ancillary to the regulation of television broadcasting. Liquor advertising laws promulgated under the Twenty-First Amendment which directly address the protection of the public health fall instead within the most traditional concept of the police power. Ziffrin, Inc. v. Reeves, supra; Dunagin v. City of Oxford, Mississippi, 718 F.2d 738 (5th Cir. 1983).

Instructive here is this Court's treatment of an analogous State advertising regulation which was upheld by this Court in Head v. New Mexico Board of Examiners in Optometry, 374 U.S. 424 (1963). The case is analogous because New Mexico there, like Oklahoma here, had acted to protect the health and welfare of its citizens. In Head, appellants, a newspaper owner and a radio station owner were enjoined in State Court from accepting or

publishing within the State of New Mexico a Texas optometrist's advertising found to be in violation of New Mexico law. The appellants claimed that regulation of radio advertising had been preempted by the Communications Act of 1934. In rejecting that argument, this Court noted:

> "The purpose of this provision, according to the Supreme Court of New Mexico, is to 'protect . . . citizens against the evils of price-advertising methods tending to satisfy the needs of their pocketbooks rather than the remedial requirements of their eyes." Id., 374 U.S. at 426.

The Court, in Head, ultimately resolved the question before it by concluding that the Communications Act had plainly evidenced no congressional intention to totally oust State regulatory authority in areas also regulated under that Act, and, in the absence of any direct conflict between the State advertising regulation and

some specific element of the federal law, upheld the New Mexico law.

Also important to this question of preemption by federal occupation of the field is the recent expression of the United States Congress' intention not to totally preempt the field of cable television regulation as evidenced by passage, in the United States Senate, of the proposed Cable Telecommunications Act of 1983. Senate Bill No. 66, 98th Cong., First Session (1983). The Act is Congress' most recent piece of legislation dealing with cable television communications. It was passed by the Senate on June 14, 1983, and amends the Communications Act of 1934, supra, as it specifically relates to cable television. Congressional Record June 14, 1983, p. S8325. Congress' intent not to totally preempt the field of cable television is

clear and manifest, especially where local legislation dealing with public health, safety, and welfare is concerned. Section 2(c) of the Act states:

> ". . . Any State or political subdivision or agency thereof, or franchising authority, may exercise jurisdiction over matters which are necessary for reasons of public health, safety and welfare." (Emphasis added.) Id., p. S8328.

Unlike Head, the case at bar does present a question involving direct conflict between specific federal regulations and a State prohibition of advertising. As discussed further below, resolution of that conflict depends upon a balancing of the competing State-federal interests, inasmuch as the Oklahoma advertising prohibition operates only in the area of State interest specially protected under the Twenty-First Amendment. Nevertheless, the ruling in Head, especially when it is viewed in light of recent congressional

actions in this field, destroys the force of the Petitioners' argument that Oklahoma's advertising prohibition must fail because regulation of cable television has generally been preempted by congressional occupation of this regulatory field.

B. The Copyright Act of 1976

Section 111(c)(3) of the Copyright Act requires cable systems to carry broadcast signals without deleting any material, including advertisements. In order for cable operators to comply with State law, they must delete or substitute wine advertisements shown on cable television. To do so would mean violating the Copyright Act. While the State and federal laws here do conflict, Congress has not intentionally preempted this field so as to forbid States from exercising their Twenty-First Amendment powers.

Section 301 of the Copyright Act which could be argued to demonstrate a congressional intent to preempt State law states:

> ". . . Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any state."

However, this language demonstrates only Congress' intent to preempt State laws which attempt to create the same rights as those created by the Copyright Act. It shows no intent to otherwise totally occupy the field. Roth v. Partkin, 710 F.2d 934 (2d Cir. 1983). Here, Oklahoma's laws survive federal preemption because they are not attempting to create any right identical to those found in the Copyright Act. Oklahoma is merely attempting to exercise its Twenty-First Amendment powers to regulate liquor sales. Absent a congressional intention to occupy

the field, State regulations may be permissible. Goldstein v. California, 412 U.S. 546 (1973). Congress does not appear to have intended total frustration of State policies concerning the health and welfare of State citizens when adopting Section 111(c)(3). Congress' intent in adopting that section was to create a nationwide scheme of compulsory licensing. This intent would not be undermined if Oklahoma's liquor advertising laws were allowed to stand.

This Court has provided clear guidance with respect to the weight accorded to State regulatory interests in cases of this sort. In Goldstein v. California, supra, this Court held a California statute valid against a preemption challenge under the copyright law. The interests of California in particular and of federalism in general were given emphasis, and the

Court refused to read the Copyright Clause of the Constitution to foreclose the existence of all State power "to grant to authors the exclusive right to their respective writings." Id., at 560.

This Court also held that the 1909 Copyright Act did not preempt the California statute. In so doing, the Court stated:

> ". . . Since the subject matter to which the Copyright Clause is addressed may thus be of purely local importance and not worthy of national attention or protection, we cannot discern such an unyielding national interest as to require an inference that state power to grant copyrights has been relinquished to exclusive federal control." (Emphasis original)

Clearly, the protection of health, safety and welfare of the citizens of Oklahoma is the type of purely local concern the Court spoke of in Goldstein, supra. These State interests need not give way to such a miniscule federal

interest as promotion of diversity in cable programming. Further, although the Copyright Act in question in Goldstein was the 1909 Act rather than the 1976 Act, Goldstein is still instructive here. For example, this Court, most recently in Aronson v. Quick Point Pencil Co., 440 U.S. 257 (1979), held that State contract law was not preempted by federal patent law, citing Goldstein v. California, supra, at 262. This Court stated:

> "State law is not displaced merely because the content relates to intellectual property which may or may not be patentable; the states are free to regulate the use of such intellectual property in any manner not inconsistent with federal law." Id., at 262.

This clearly shows this Court's willingness to examine the interests involved in a particular case to determine if federal or State law will prevail, even where Congress has partially preempted the field. Moreover, this Court did not

attempt to redefine its holding in Goldstein despite Congress' comprehensive amendment of copyright law in the 1976 Act. This tends to demonstrate that Goldstein is still viable precedent and may be controlling when discussing federal preemption under the 1976 Copyright Act.

Similarly, the Circuit Courts have continued to apply Goldstein in this fashion after 1976 on questions of preemption. See, Roth v. Pritkin, 710 F.2d 934 (2d Cir. 1983) (holding that the rules of the 1976 Copyright Act are applicable retrospectively); Moresburg v. Balyon, 621 F.2d 972 (9th Cir. 1980) (holding that the California Resale Royalties Act was not preempted by the Copyright Act). Thus, the language of the Copyright Act and the Court's application of Goldstein clearly dictate that Congress has not, by the Copyright Act of 1976, preempted this

field to the exclusion of the States, at least insofar as States, either by expressed intention or by total occupation, are empowered to regulate for the public health and safety of their citizens.

C. On balance, the federal interest in providing and protecting a nationwide cable system is substantially outweighed by Oklahoma's interest in promoting and preserving the safety, health and welfare of its citizens.

As discussed above, Congress has apparently never intended that States should be totally prevented and preempted from all regulatory activity with regard to the advertisements which may be carried upon cable television channels, by virtue of the federal regulatory systems embodied in and authorized by the Communications Act of 1934, supra, and the Copyright Act of 1976, supra. Nonetheless, there remains a

direct conflict between Oklahoma's prohibition of liquor advertising, insofar as it may apply to wine advertising on cable television, and these federal acts and the regulations adopted under them. In a sense, then, these apparent conflicts still present a question of preemption and application of the Supremacy Clause, supra.

However, the Commerce Clause, supra, pursuant to which the Communications Act was adopted, the Copyright Clause, United States Constitution, Art. I, § 8, cl. 8, pursuant to which the Copyright Act was adopted, and the Supremacy Clause are all part of the same Constitution as the Twenty-First Amendment, under which Oklahoma claims special prerogatives with regard to the regulation of liquor advertising.

> "Like other provisions of the Constitution, each must be considered in light of the other, and in the context of the issues and interests at stake in any concrete case." Hostetter v. Idlewild Bon Voyage Liquor Corp., supra, 377 U.S. at 332.

Consequently, because this is a Twenty-First Amendment case, whether the State-federal inconsistency exists by virtue of federal occupation of the field, or because, as here, of directly opposing provisions of law, the only proper approach to resolving the conflict is to conduct a balancing of the competing constitutional interests, as was done by this Court to resolve such a conflict in the case of California Retail Liquor Dealers Ass'n v. Midcal Aluminum Corp., supra.

The common experiences of daily life instruct us that there undoubtedly is physical harm directly caused to Oklahoma citizens by liquor use. The slaughter on

the State's highways caused by the intoxicated driver is the injury to innocents most commonly associated with alcohol use. But the other harms associated with the liquor traffic are legion, including such social problems as the abuse of children and other defenseless persons by a drunken parent, relative, spouse or friend.

There is also psychological harm to the drinker himself. "Loss of self-esteem" is a euphemistic phrase; what it translates to in reality is the familiar Skid Row derelict. In New York City, the milieu for such victims of the liquor traffic is called the Bowery; in Oklahoma City, it is known as "Reno Street"; but every urban area has its own Skid Row.

Further, there are many other emotional ills resulting from drinking, the effects of which range from divorce or domestic disputes to job absenteeism and

decreased productivity in the work force. When an Oklahoma worker is fired from his or her job because of drinking, that individual may become a ward of the State. The State may pay unemployment compensation to the now unemployed worker. Accordingly, the State must collect more unemployment insurance from employers. This in turn causes higher costs of goods. The ramifications are endless. These problems were all properly noticed by the Court of Appeals in the Opinion Below. Cablecom-General, Inc. v. Crisp, supra, 699 F.2d at 500.

Another common sense observation which can be made about the social evils inevitably incident to the traffic in intoxicating liquor is that the caseload of the State court system is substantially increased because of problems associated with drinking. What trial judge has not

presided over numerous criminal matters caused by intoxication, or handled divorces caused by alcoholism? How often do trial or appellate judges (as well as State or local juvenile agencies) deal with battered, abused or neglected children, because one or both of the parents abuse alcohol . . . and then abuse their children? How many personal injury lawsuits based upon an automobile accidents are traced to a drunk driver? Drinking affects amost every branch of State and local government, including the judiciary, as well as the citizenry at large.

The States, and each of them, have a very direct and real interest in all these numerous problems. Some States, including Mississippi and Oklahoma, have chosen to prohibit or significantly restrict the commercial advertisement of liquor seeking to discourage the sale and use of liquor

products by preventing the liquor merchants from encouraging such activity. These restrictions are well within the States' broad Twenty-First Amendment powers, as well as within the States' ordinary police powers. Dunagin v. City of Oxford, Mississippi, supra.

This Court must now balance the conflicting regulatory interests in question. In doing so, the primary balancing is of the relative harms involved. Arrayed against the numerous ills caused by liquor use, described above, which ills directly affect the State government and its citizens, are the federal copyright laws and federal communications regulations which interfere with the States' attempt to minimize the evils of intoxicants.

Certainly no social harm results if this Court declines to apply the federal regulations to compel carriage of liquor

advertising in Oklahoma. Further, as Oklahoma's advertising prohibition is narrow in scope, and is directed only at advertisements for intoxicating liquors, the impact upon any federal interest in a national communication system is de minimus, at best. Additionally, the primary purpose of the United States Constitution's Copyright Clause and the Copyright Act of 1976 is to protect authors from the unauthorized use of their creations, and to ensure that they, rather than others, will be the sole beneficiaries of their creativity. See, e.g., Goldstein v. California, supra. To this extent, then, Oklahoma's advertising prohibition, preventing, as it does, the use of such materials under limited circumstances, has, at most, a negligible impact upon the federal interests served by the copyright laws.

Moreover, the Respondent has found no indication, nor have the Petitioners suggested any, that either Congress or the FCC was mindful of liquor advertising in adopting the copyright laws and communications regulations here in issue. Insofar as such provisions of federal law now appear to conflict with Oklahoma's prohibition of such advertising, the conflict would appear to be entirely inadvertent, and unrelated to any federal interest which prompted the enactment of such laws and regulations by Congress and the FCC.

Therefore, this Court ought to conclusively strike the balance in favor of Oklahoma liquor advertising laws and hold the FCC regulations and copyright law here in question unconstitutional, as applied, under the Twenty First Amendment, by virtue of Oklahoma's supervening interest in discouraging the liquor traffic.

IV. Oklahoma's prohibition of liquor advertising is a lawful exercise of the State's enhanced police power under the Twenty-First Amendment and is constitutional under the First Amendment, when applied to prevent promotional advertising of wine on cable television.

A. Messages and information delivered, unsolicited, directly into the homes of citizens by electronic media are accorded less protection under the First Amendment than would exist for the same "speech" in some other context or medium.

In the case of Federal Communications Comm. v. Pacifica Foundation, 438 U.S. 726 (1978), this Court plainly recognized that government restrictions on expression which might be unconstitutional in some circumstances might, nonetheless, be valid where the expression is delivered via one of the electronic media. The Court made a number of points which emphasized and explained the subordinate position of the

electronic media under the First Amendment, stating:

> "We have long recognized that each medium of expression presents special First Amendment problems. And of all forms of communication, it is broadcasting that has received the most limited First Amendment protection.
>
> * * * *
>
> "The reasons for these distinctions are complex, but two have relevance to the present case. First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder.
>
> * * * *
>
> "Second, broadcasting is uniquely accessible to children, even those too young to read." Id., 438 U.S. at 749-751. (Citations omitted)

These important distinctions between electronic signals delivered directly into the home and other forms of communication are of central importance to analysis of

the commercial speech issues presented by the case at bar. The Petitioners present only a question regarding the validity of Oklahoma's prohibition of the liquor advertising delivered directly into Oklahoma homes through television receivers. Further, because the advertisements in issue are "commercial speech" as well, the Petitioners have no standing to challenge the constitutionality of the liquor advertising prohibition as it might apply to such advertising in any other medium. The overbreadth doctrine does not apply to cases involving only "commercial speech." Bates v. State Bar of Arizona, 433 U.S. 350, 379-381 (1977). Thus, the analysis of the First Amendment issues in this case must begin from the premise that the First Amendment presents a lesser restraint on the power of the State government to regulate the conduct of these Petitioners

because they seek to deliver the prohibited expression directly into private homes on television.

B. Because the wine advertisements which the Petitioners seek to disseminate free of State government interference are "commercial speech," the degree of constitutional protection to which they are entitled is further attenuated.

The cases of this Court have consistently recognized the common-sense differences between speech which does no more than propose a commercial transaction, and other forms of expression protected by the First Amendment. Ohralik v. Ohio State Bar Assn., 436 U.S. 447 (1978). Little more than a generation ago, the presence of a commercial message, even when joined with political expression, was deemed by this Court to deprive the political speech of the First Amendment protection to which

it would have otherwise been entitled. Valentine v. Christensen, 316 U.S. 52 (1942). Since then, of course, there has been substantial evolution of the doctrine governing cases involving regulation of commercial expression. However, it remains settled that commercial speech is accorded a lesser constitutional protection than is other constitutionally guaranteed expression. Central Hudson Gas & Elect. Corp. v. Public Service Comm., supra, 447 U.S. at 563.

C. The wine advertisements which the Petitioners seek to disseminate in Oklahoma are devoid of most of the constitutionally significant characteristics which have weighed in favor of providing First Amendment protection for commercial speech in other cases.

In the handful of cases in which this Court has found it necessary to strike

down government regulations or prohibitions of various forms of commercial speech, there has always been substantial emphasis upon a number of characteristics of the commercial speech found worthy of protection and a recognition that these characteristics specially mitigated in favor of granting constitutional protection for the commercial expression under examination. In Bigelow v. Virginia, 421 U.S. 809 (1975), the commercial speech in question was an advertisement for abortion services, the provision and receipt of which are, themselves, activities entitled to a certain degree of independent constitutional protection. Roe v. Wade, 410 U.S. 113 (1973). Similarly, the privacy rights of consumers weighed in favor of allowing First Amendment protection for commercial advertising of contraceptives

in the case of Carey v. Population Services International, 431 U.S. 678 (1977). As recently as last term, the Court again recognized that First Amendment protection of commercial speech may be especially appropriate where the subject matter of such speech "relates to activity which is protected from unwarranted state interference." Bolger v. Youngs Drug Products Corp., ___ U.S. ___, 103 S. Ct. 2875, 2881 (1983).

By contrast, the wine advertisements at issue in this case do not relate to activities which are themselves entitled to independent constitutional protection, but, quite the contrary, relate to activities which are peculiarly subject to unusually stringent government control under the Twenty-First Amendment. Thus, although there are constitutional values extrinsic to the commercial speech issue

present in this case, those values balance against, rather than in favor of, granting First Amendment protection for that commercial speech. See, California v. LaRue, 409 U.S. 109 (1972); New York State Liquor Auth. v. Bellanca, 452 U.S. 714 (1981).

The consumer interests in this case are also significantly different than those presented in the various cases where this Court has deemed commercial speech to be worthy of First Amendment protection. The products which are the subject of these wine advertisements are not vital necessities. The Court is not here being asked to protect consumers' rights to obtain information important to the protection of health, Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Counsel, Inc., 425 U.S. 748 (1976), to the preservation of legal rights, In re R. M. J.,

455 U.S. 1981 (1982), nor to protect their rights to learn where they might find a suitable residence, Linmark Assoc. v. Twnshp, of Willingboro, 431 U.S. 85 (1977). The general societal interest in the free flow of commercial information, present in any commercial speech case, is not, in this case, enhanced by any special or extraordinary consumer interest in or need for promotional wine advertising, and the Petitioners have offered no suggestion that the products they wish to have advertised are equal, on any relative scale of consumer values, to the kinds of products or services for which advertising has been protected by this Court.

It is also significant in this case that the wine advertisements in question cannot, under the circumstances of the case, be said to contain the kind of factual economic information which has been

central to the recognition of First Amendment protection for commercial speech in other cases. The advertisements which the Petitioners seek to disseminate in Oklahoma all originate outside of Oklahoma. They are obviously not provided directly by or on behalf of retail liquor stores or product manufacturers within Oklahoma, and do not pertain to specific terms of sale for any products available in Oklahoma. As these advertisements will generally consist either of brand name and image advertising, or of price advertising of specific products only available at remote locations outside of Oklahoma, the importance of these advertisements for individual consumer economic decision making is plainly marginal.

The Respondent recognizes that it is not necessary that commercial speech consist of price information, or any other

specific information in order for such speech to be entitled to a degree of First Amendment protection. Nonetheless, it remains plain under the cases that a closer nexus between the economic interests of consumers and the information in the advertisement justifies a relatively greater degree of constitutional protection for the information. Thus, in Bates v. State Bar of Arizona, supra, 433 U.S. at 364, the Court observed that:

> "Advertising, though entirely commercial, may often carry information of import to significant issues of the day. And commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensible role in the allocation of resources in a free enterprise system. In short, such speech serves individual and societal interests in assuring informed and reliable decisionmaking." (Citations omitted)

To the extent the wine advertisements for which protection is sought in this case do not and cannot contain information

relating to specific economic decisions consumers will be called upon to make in the marketplace, it follows that the societal and consumer interests in protecting the flow of such information must be seen as relatively less substantial than the interests at stake in the cases where an advertiser seeks to inform a consumer of prices and locations where important and necessary products are available.

D. The Tenth Circuit Court of Appeals, in the Opinion Below, correctly balanced the competing constitutional interests at issue in this case, and properly concluded that Oklahoma's interest in discouraging the use of liquor is substantial, that a prohibition of liquor advertising directly advances such interest, and that no alternative form of regulation would serve such interest as well.

The Petitioners in this case have suggested that where a State has chosen to

completely prohibit some form of commercial speech, such a "blanket ban" should be deemed, apparently per se, as being unconstitutional under the First Amendment, if the commercial speech is truthful and not related to unlawful activity. See, Brief of Petitioner, Capital Cities Cable, Inc., pp. 14-15. The Petitioners' arguments also imply that the State of Oklahoma is necessarily under a heavy evidentiary burden to sustain its prohibition of liquor advertising, almost as if the regulation in question were subject to strict scrutiny, and would be unconstitutional unless the State could prove that its interest is compelling and that the prohibition in question is the narrowest possible means of serving such interest.

These arguments tend to show that the Petitioners apparently misperceive the

nature of the inquiry which must be undertaken in any commercial speech case, as well as that which is necessarily required when, as here, each side of the controversy is supported by counterpoised federal constitutional interests. In all such cases the use of a "per se" rule of decision is inappropriate, and instead it is required that the nature of the competing interests be carefully analyzed and that they then be balanced against one another.

In the case of Central Hudson Gas v. Public Service Comm'n., supra, 447 U.S. at 566, this Court described the framework within which any such balancing must occur, saying:

> "In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within the provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental

> interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest."

The Petitioners' arguments, therefore, must be interpreted as questioning whether Oklahoma's asserted interest in discouraging the use of liquor is substantial, whether the prohibition of liquor advertising directly advances that interest, and whether some regulation less intrusive than that prohibition could serve Oklahoma's interest as well.

1. Oklahoma has a substantial and proper State interest in discouraging the purchase, sale and consumption of wine and other liquor products.

The State of Oklahoma has always, to some greater or lesser extent, discouraged the sale and consumption of various liquor products. In fact, one of the conditions

under which Oklahoma was admitted to the Union required that total prohibition of liquor and of liquor advertising be continued for a period of twenty-one years after Statehood, in at least those portions of the State which had previously consisted of Indian Territory. See, Statement of the Case, supra at p. 3.

This Court has recognized the substantiality of States' interests in suppressing and regulating various aspects of the liquor trade in a variety of circumstances. The substantiality of Oklahoma's interest in this case is enhanced and accorded its own constitutional significance by the Twenty-First Amendment. Thus, analysis of a case involving a State law regulating or suppressing some aspect of the liquor trade must begin with a recognition of the State's special prerogatives under that Amendment. Seagram & Sons v. Hostetter, 384 U.S. 34, 41 (1966).

Contrary to the assertions of the Petitioners, the States' substantial interest in discouraging various aspects of the liquor trade have been held significant enough to overcome conflicting federal constitutional interests in a variety of circumstances, even where such federal interests arise under the First Amendment. Consequently, artistic performances which would otherwise be protected under the First Amendment, have been held to be properly prohibited by State law where they occur in places where liquor is served. New York State Liquor Auth. v. Bellanca, supra, 452 U.S. at 716.

More directly, just last term, this Court expressly, albeit without plenary consideration, recognized a State's substantial interest in discouraging the sale and use of liquor by enforcement of a prohibition of liquor advertising, when the

Court dismissed the appeal for want of a substantial federal question, in the case of Queensgate Investment Co. v. Liquor Control Comm., 433 N.E.2d 138 (Ohio 1982), appeal dismissed, ___ U.S. ___, 103 S. Ct. 31 (1982).

As the Tenth Circuit Court of Appeals properly recognized in the Opinion Below, it is beyond question that Oklahoma possesses a "legitimate and substantial interest" in pursuing regulatory policies which are based upon the common-sense observation that the use and abuse of alcohol can and does have a significant and adverse effect on the health and welfare of Oklahoma citizens, the safety of State highways, the stability of our families, and the productivity of the State's workforce. This interest is substantial under the ordinary police power of the State. Cablecom-General, Inc. v. Crisp, supra,

699 F.2d at 500. Further, the State's claim that this interest is substantial can only be enhanced by the force and effect of the Twenty-First Amendment, which accords constitutional recognition to the States' special interests in protecting their citizens from the social problems necessarily incident to the commerce in liquor products. See, Ziffrin, Inc. v. Reeves, 308 U.S. 132, 138-139 (1939). The constitutional recognition that States possess the right to totally outlaw all traffic in liquor products necessarily implies that States possess a substantial interest in discouraging the sale and use of such products.

2. A prohibition of wine advertisements which encourage the increased use and sale of liquor products directly advances Oklahoma's substantial interest in discouraging the sale and use of such products.

The Petitioners argue that even if the substantiality of Oklahoma's interest in discouraging liquor sales and use is conceded, the State has nonetheless failed to "prove" that a prohibition of advertising of liquor products "directly advances" that interest within the contemplation of the test enunciated in Central Hudson, supra. However, the argument overlooks the significant deference to which the State's legislative judgment is entitled in such cases.

A similar challenge to the sufficiency of the record on the issue of direct advancement was offered in the case of MetroMedia, Inc. v. San Diego, 453 U.S.

490 (1981). However, in that case, the Court held that the question of "direct advancement" turns upon whether the challenged legislative judgment can be judged to be rational, rather than upon whether it can be evidentiarily proven that the restriction in question in fact directly advances the substantial State interest. The Court stated:

> "The more serious question, then, concerns the third of the Central Hudson criteria: Does the ordinance 'directly advance' governmental interests in traffic safety and in the appearance of the city? It is asserted that the record is inadequate to show any connection between billboards and traffic safety.
>
> * * * *
>
> ". . . [T]he California Supreme Court agreed with many other courts that a legislative judgment that billboards are traffic hazards is not manifestly unreasonable and should not be set aside. We likewise hesitate to disagree with the accumulated, commonsense judgments of local lawmakers and of the many reviewing courts that billboards are real and substantial hazards to traffic safety. There is

> nothing here to suggest that these judgments are unreasonable." Id., 453 U.S. at 508-509. (Citations omitted)

The question presented here, then, is whether the common-sense judgment of the people of Oklahoma, voting at a State-wide election, and even of the United States Congress, Oklahoma Enabling Act, supra, § 3, that liquor advertising should be prohibited because it encourages that which the State may rightfully discourage, is manifestly unreasonable. While the record in this case on the question of the reasonableness of this judgment is, indeed, meager, there is certainly nothing before the Court tending to establish that such judgment is "manifestly unreasonable." Id.

Further, as discussed above, a variety of factors justify substantially enhanced deference to this legislative judgment in this case. For example, in the case of

Bolger v. Youngs Drug Products Corp., supra, ___ U.S. at ____, 103 S. Ct. at 2284, this Court implicitly recognized the need for additional deference to such legislative judgments where the commercial speech in question intrudes into private homes via electronic media. This naturally follows from the subordinate position to which radio and television are relegated on the relative scale of First Amendment values. Additional deference is also warranted inasmuch as the State is acting here in pursuit of its special prerogatives under the Twenty-First Amendment. Thus, an additional presumption of validity attaches to the State's judgment that wine advertising encourages the sale and use of wine. California v. LaRue, supra, 409 U.S. at 118-119.

Oklahoma's judgment that prohibition of liquor advertising directly advances

the State's substantial interest in discouraging sale and consumption of such products is not manifestly unreasonable. The validity of such a judgment has been directly upheld by the Tenth Circuit Court of Appeals, in the Opinion Below, and by other Courts, as well. Queensgate Investment Co. v. Liquor Control Comm., supra, 433 N.E.2d at 142; Oklahoma A.B.C. Board v. Burris, 626 P.2d 1316 (Okl. 1980). The record and the arguments in this case provide no basis for setting that judgment aside.

3. No regulation of liquor advertising other than a prohibition of such advertising can serve as well to directly advance Oklahoma's substantial interest in discouraging liquor use.

The Petitioners suggest that Oklahoma's prohibition of wine advertisements on cable television is too drastic a means

of advancing the State's legitimate interests. However, this last element of the commercial speech balancing test enunciated in Central Hudson, supra, is also satisfied in this case.

Under the facts of this case, it is apparent that Oklahoma totally lacks any ability to regulate the liquor advertising in question in any way short of total prohibition which would also serve the State's substantial interests. Clearly, regulation of the content of such advertisements is completely impossible because all such advertisements originate outside of Oklahoma. Thus, Oklahoma has no way of insuring that such advertisements will not be misleading or will not encourage unlawful use of the products represented. Further, the limited resources available to State government in any event prevent, as a practical matter, the implementation of

any ongoing regulatory scheme for the review and approval of the content of such advertisements.

The Petitioners have only offered a single proposed regulatory alternative to Oklahoma's prohibition of liquor advertising. They suggest that the reintroduction of total liquor prohibition in Oklahoma would offer a less restrictive program of regulation in pursuit of the State's interest, but that argument is self-defeating. If Oklahoma were to reestablish the total prohibition of liquor and wine which existed in the State prior to 1959, the sale and use of the products which the Petitioners would have advertised in Oklahoma would, once more, be illegal. Subsequently, the advertisements for which the Petitioners seek constitutional protection would relate to unlawful activity and, accordingly, would fall completely outside

the limited protection afforded to commercial speech under the First Amendment. Pittsburgh Press Co. v. Comm. on Human Relations, 413 U.S. 376, 388 (1973).

With regard to the wine advertisements which the Petitioners seek to deliver into Oklahoma homes, either Oklahoma must permit them in their entirety, or prohibit them in their entirety. There exists no workable middle ground, and none has been suggested by the Petitioners. Therefore, Oklahoma may properly compel the deletion of wine advertisements contained in cable television programming, and it will be necessary for the Petitioners to develop the technical means by which this can be accomplished. In any event, Oklahoma must be permitted to prevent encouragement of that which the State has the undeniable right to discourage.

E. Oklahoma's prohibition of broadcast liquor advertising does not require either alteration or deletion of commercial or noncommercial programming content other than the liquor advertisements themselves.

As demonstrated above, Oklahoma's prohibition of wine advertising, which encourages the increased use and sale of liquor products, directly advances Oklahoma's substantial interest in discouraging the sale and use of intoxicating liquors. However, Petitioners also argue that Oklahoma's prohibition would not only require deletion of liquor advertising, but would also adversely impact other commercial and noncommercial programming. The record simply does not support Petitioners' contention.

Petitioners contend that Oklahoma's prohibition of liquor advertising would force cable operators to refrain from

carrying various out-of-state cable programs. However, the District Court record does not support this unfounded conclusion. Rather, the record reflects that it would indeed be possible to delete liquor advertising only. In fact, Petitioners' own witness, Ronald L. Marnell, of Multimedia Cablevision, Inc., testified that it would be possible to delete liquor advertising through the simple expedient of employing an operator to monitor the signal coming through a cable system:

> "Q. Now, what would a cable system need in order to be able to delete these wine commercials as they came in?
>
> "A. It would be my opinion that they would need an operator to monitor the signals coming through there rather than just having them come through unattended on every channel that you are going to monitor those commercials and attempt to delete them as they appear on the screen through some means." (J. A. p. 25)

Similarly, Wilburn L. Hammack of Cablecom-General, Inc., testified that it was possible for cable operators to delete liquor advertising:

"Q. Mr. Hammack, you say that you have no staff on outlaying towers; is that correct? Antennas?

"A. No, sir.

"Q. Are you saying it's impossible to have someone to staff those, if necessary?

"A. I would say it would be impracticable, not impossible.

"Q. The question was; is it impossible, sir?

"A. No, it's not impossible." (J. A. p. 39)

Admittedly, while most cable operators in Oklahoma do not presently employ the personnel or equipment necessary to delete liquor advertising, the deletion of such is not impossible. Nor is there any indication in the record that rather than deleting such messages, cable operators

would be forced to delete several or all out-of-state signals. Furthermore, the practicality of cable television commercial deletion was empirically tested by the Federal Communications Commission at a time when the Commission was considering adoption of a rule which would have required deletion of all commercials from distant signals, and such deletion, even using a totally manual system, was expressly found to be feasible. Cable Television Report and Order, 36 F.C.C.2d 138, 156 (1972).

In short, Petitioners' argument that Oklahoma's regulation, which merely requires deletion of liquor advertisements only, would somehow require cable operators to totally abandon or severely curtail the transmission of other content, is simply not supported by the record. This being the case, it cannot be said that

Oklahoma's regulations materially affect the dissemination of noncommercial or other commercial programming.

F. Conclusion

The Petitioners' case is based on the bizarre notion that although total prohibition of commerce in liquor may be constitutionally valid, partial prohibition is not. In reaching such conclusion, the cable broadcasters totally disregard the extent to which various factors attenuate their claims to First Amendment protection, and are insensitive to the State's special regulatory prerogatives under the Twenty-First Amendment.

However, because Oklahoma may lawfully seek to discourage the sale and consumption of liquor products, even where such activities are not themselves illegal, it must be recognized that the State may prevent the use of all of the sophisticated

tricks of Madison Avenue to instead encourage the use of such products. Oklahoma's ban on liquor advertising is a reasonable means of combating the rising liquor tide in the State, and is targeted only against those who would seek to raise that tide. The Opinion Below properly recognized this and ought to be affirmed.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Tenth Circuit should be affirmed.

Respectfully submitted,

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No. 82-1795

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CAPITAL CITIES CABLE, INC., *et al.*,
Petitioners,

v.

RICHARD A. CRISP, DIRECTOR,
OKLAHOMA ALCOHOLIC BEVERAGE CONTROL BOARD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY BRIEF FOR PETITIONER CAPITAL CITIES CABLE, INC.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-1795

CAPITAL CITIES CABLE, INC., *et al.*,
Petitioners,

v.

RICHARD A. CRISP, DIRECTOR,
OKLAHOMA ALCOHOLIC BEVERAGE CONTROL BOARD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY BRIEF FOR PETITIONER CAPITAL CITIES CABLE, INC.

I. RESPONDENT HAS NOT REFUTED PETITIONER'S SHOWING THAT OKLAHOMA'S ADVERTISING BAN UNCONSTITUTIONALLY RESTRICTS COMMERCIAL SPEECH.

1. Respondent does not claim that the wine advertisements in question are false or misleading or that they promote an illegal product. Nor does respondent attempt to justify Oklahoma's ban on those advertisements as a limited time, place or manner restriction. To the contrary, respondent describes the Oklahoma ban as a "total prohibition" [1] intended to diminish sales and consumption

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[1] Brief of Respondent ("Resp. Br.") at 86, 93.

of alcoholic beverages.[2] As discussed in our opening brief, this is precisely the sort of blanket ban that this Court has repeatedly condemned.[3]

Contrary to respondent's suggestion, the Court's strong stance against blanket bans on protected expression was not relaxed in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980),[4] and was later expressly reaffirmed in *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 505 (1981), in which the Court declared that "[a] State may not completely suppress the dissemination of truthful information about an entirely lawful activity merely because it is fearful of that information's effect upon its disseminators and its recipients." Oklahoma's ban on alcoholic beverage advertising is conceded by respondent to be precisely this sort of suppression. It is accordingly invalid under the First Amendment.

2. Respondent's efforts to demonstrate that the ban satisfies the *Central Hudson* test are unavailing. The third part of the test requires the state to show that the restriction directly and effectively advances the asserted state interest—here the interest in combatting alcohol abuse. Respondent attempts to make this showing by referring for the first time to a 1980 study by researchers at Michigan State University.[5] However, the study's findings do not support respondent's position since they provide no evidence that wine advertising significantly

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[2] *See, e.g.*, Resp. Br. at 86.

[3] Brief of Petitioner Capital Cities Cable, Inc. ("Cap. Cities Br.") at 12-17.

[4] *See id.* at 14-15.

[5] C. Atkin & M. Block, *Content and Effects of Alcohol Advertising*, Michigan State University (1980), prepared for the Bureau of Alcohol, Tobacco and Firearms, the Federal Trade Commission, the National Institute of Alcohol Abuse and Alcoholism, and the Department of Transportation.

increases overall alcohol consumption or alcohol abuse.[6] Apart from this study, respondent relies solely on a claimed "common-sense judgment" that advertising of alcoholic beverages encourages alcohol abuse.[7] This is an insufficient justification under the *Central Hudson* test. As this Court has made clear, the party seeking to uphold a content-based restraint bears the burden of demonstrating the link between the regulation and the asserted state interest and must do so with record evidence, rather than with mere conjecture or "plausible" assumptions.[8] There is no evidence in this record establishing such a link.[9]

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[6] While the study found some correlation between the advertising of alcoholic beverages and overall consumption, it concluded that the relationship is "not strong," *id.* at 23, and that the principal effect of the advertising is to increase consumer awareness of particular brands. *Id.* at 13-15, 19. The study also found that the relationship between *wine* advertising and consumption was "not significant" among young people and "weak[]" among adults. *Id.* at 20, 22. The publication cited by Amicus S.A.N.E., Inc.—M. Jacobson, G. Hacker & R. Atkins, *The Booze Merchants* (1983)—is similarly devoid of any statistical or other evidence linking wine advertising with increased consumption, excessive drinking, or alcoholism. *See* Brief of Amicus S.A.N.E., Inc., at 4-6.

[7] Resp. Br. at 89.

[8] *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 96 (1977). *See also Bolger v. Youngs Drug Products Corp.*, 103 S.Ct. 2875, 2882 n.20, 2994 (1983); *Bates v. State Bar of Arizona*, 433 U.S. 350, 368-79 (1977).

[9] Respondent relies on *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981), as holding that such a showing is not required in this case. Resp. Br. at 87-89. As discussed in petitioner's opening brief, *Metromedia* is not controlling here, since it did not involve a content-based restriction. Cap. Cities Br. at 19. *See also* Comment, *Alcoholic Beverage Advertising and the First Amendment*, 52 Cin. L. Rev. 861, 897-98 (1983) ("Comment"). Moreover, the Court emphasized in *Metromedia* that numerous legislatures and courts had recognized that the restriction in question effectively advanced the asserted state interests. 453 U.S. at 509-10. Here, in contrast, only one other state (Mississippi) has enacted a general prohibition of

3. Respondent has also failed to show that the ban satisfies the fourth part of the *Central Hudson* test—the absence of alternative measures less destructive of First Amendment rights. Respondent simply ignores various alternatives suggested by petitioner in its opening brief and by the district court below, including stricter time, place and manner restrictions on the dispensation of alcohol, labeling requirements on alcoholic beverage containers or in places where alcohol is sold, and educational programs to inform people of the dangers of alcohol abuse.[10] Respondent also fails to show that an outright prohibition of the sale of alcoholic beverages would not adequately serve the State interest.

4. Respondent asserts various reasons why the protection accorded commercial speech should be relaxed in the circumstances of this case. First, respondent contends

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alcoholic beverage advertising, and not even Mississippi prohibits cable operators from transmitting wine advertisements that originated outside the State. *See Dunagin v. Oxford*, 718 F.2d 738, 741 (5th Cir. 1983).

Amicus State of Mississippi suggests that the Court in *Central Hudson* recognized a link between advertising of a product and its increased consumption. Brief of Amicus State of Mississippi ("Miss. Br.") at 9-10. Even assuming that the advertising of certain brands of wine increases consumption of those brands, this does not necessarily mean an increase in the overall consumption of wine or alcoholic beverages, much less an increase in alcohol abuse, and a ban on the advertising of wine cannot be justified on this basis. *Cf. Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 570 (1980); *Linmark Associates, Inc. v. Willingboro*, 431 U.S. at 95-96.

[10] *See* Cap. Cities Br. at 22-23; Appendix G to the Petition for Certiorari ("Pet. App. G") at 48a-49a. The Kerr Report on Alcohol Abuse in Oklahoma, a 1979 study relied on by respondent as evidence of the State's alcohol problem, stressed educational programs as the most promising route toward prevention of alcohol-related problems. The study did not even mention restrictions on advertising as an important part of the prevention effort. *See Alcohol Abuse in Oklahoma*, The Kerr Foundation, Inc. (1979) at 4, 45-46, 53.

that the advertisements in question are entitled to lesser protection because wine is not a "vital necessit[y]"—because it ranks lower "on any relative scale of consumer values" than other products whose advertising has been protected by this Court; and because the advertisements consist primarily of name and image promotion, rather than specific information about prices within Oklahoma.[11] However, this Court has never suggested that protection for commercial speech should turn on the value of the advertised commodity or the usefulness of the particular information conveyed. To the contrary, this Court has specifically rejected the drawing of a constitutional distinction "between publicly 'interesting' or 'important' commercial advertising and the opposite kind." *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976).[12] It has also recognized that commercial speech which informs consumers of the existence and qualities of lawful products, with or without specific price information, is entitled to First Amendment protection.[13]

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[11] Resp. Br. at 75-77.

[12] *See also Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980) (state court erred in upholding advertising ban on the ground that the advertising was of small value to society and conveyed little useful information).

[13] Thus, the Court has struck down restrictions on advertising which lacked price information, *see, e.g., In re R.M.J.*, 455 U.S. 191 (1982); *Linmark Associates v. Township of Willingboro*, 431 U.S. 85 (1977), which was simply generic in character, *see, e.g., Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), and which promoted services available outside the state. *See, e.g., Bigelow v. Virginia*, 421 U.S. 809 (1975).

Amicus State of Mississippi suggests that this Court has recognized an exception to the First Amendment protection of commercial speech when the product advertised is "harmful." Miss. Br. at 6. For this proposition, amicus relies on *Capital Broadcasting Co. v. Mitchell*, 333 F. Supp. 582 (D.D.C. 1971), *summarily aff'd*, 405 U.S. 1000 (1972), in which a federal statute prohibiting the advertising of cigarettes on radio and television was upheld. Of

Respondent also asserts that First Amendment standards should be relaxed in this case because of the State's "special prerogatives under the Twenty-First Amendment." [14] As demonstrated in petitioner's opening brief,[15] respondent's construction of the Twenty-first Amendment is not supported by any of the cases relied on by respondent and is contradicted by the Amendment's history and by decisions of this Court.[16]

Finally, respondent argues that the ban is entitled to special deference because the wine advertisements in question are in the form of electronic signals delivered directly to the home. For this proposition respondent relies on

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course, the Court's summary affirmance in *Capital Broadcasting* has limited precedential impact and must be narrowly confined to its particular facts and issues. *See, e.g., Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 180-81 (1979). The *Capital Broadcasting* decision involved federal rather than state regulation and rested on the propositions that commercial speech has negligible First Amendment protection and that the publisher or broadcaster of paid advertising has no First Amendment interest in the advertising itself. 333 F. Supp. at 584-85. Both propositions were later rejected by this Court in *Bigelow v. Virginia*, 421 U.S. 809 (1975), and other decisions regarding commercial speech.

[14] Resp. Br. at 56.

[15] Cap. Cities Br. at 23-28.

[16] *See, e.g., Larkin v. Grendel's Den, Inc.*, 103 S.Ct. 505 (1982); *Craig v. Boren*, 429 U.S. 190 (1976), and *Wisconsin v. Constantineau*, 400 U.S. 433 (1971). Respondent does not even discuss these decisions. Instead, respondent relies on readily distinguishable cases sustaining regulation of liquor licensees (*New York State Liquor Authority v. Bellanca*, 452 U.S. 714 (1981), *California v. LaRue*, 409 U.S. 109 (1972), and *Queensgate Investment Co. v. Liquor Control Commission*, 103 S. Ct. 31 (1982) (summary dismissal of appeal), *see* Cap. Cities Br. at 27-28) and on *Premier-Pabst Sales Co. v. State Board of Equalization*, 13 F. Supp. 90 (S.D. Cal. 1935) (three-judge court), a case in which no First Amendment claim was raised, which preceded by thirty years this Court's recognition that advertising is entitled to First Amendment protection, and which includes no mention whatsoever of the Twenty-first Amendment.

FCC v. Pacifica Foundation, 438 U.S. 726 (1978). However, the Court emphasized in *Pacifica* that it was upholding only a narrow restriction on the time and manner of the speech in question, rather than an outright ban such as is presented here [17] and that the restriction reached only the transmission of indecent or offensive material.[18] Whatever special latitude may be appropriate for federal regulations on the broadcasting of indecent or offensive speech is not appropriate here.[19]

II. RESPONDENT HAS NOT REFUTED PETITIONER'S SHOWING THAT THE OKLAHOMA BAN IMPERMISSIBLY RESTRAINS THE DISSEMINATION OF NON-COMMERCIAL SPEECH.

Petitioner demonstrated in its opening brief that Oklahoma's ban on alcoholic beverage advertising will compel cable operators in Oklahoma to cease their carriage of out-of-state programming that contains wine advertisements, since they are unable to delete the advertisements from the programming.[20] Respondent contends that the asserted restraint is based on economic and technological factors that make deletion of wine advertisements only impracticable, rather than impossible, and therefore is not constitutionally significant.[21] This argu-

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[17] *FCC v. Pacifica Foundation*, 438 U.S. 748, 750 (1978); *id.* at 757, 760 (Powell, J., concurring). *Cf. Carey v. Population Services International*, 431 U.S. 678, 712 n.8 (1977) (Powell, J., concurring).

[18] 438 U.S. at 750.

[19] This Court has suggested in dictum that "the special interest of the federal government in regulation of the broadcast media" might permit greater federal restrictions on advertising on radio or television. *Bolger v. Young's Drug Products Corp.*, 103 S. Ct. at 2884. Even if so, this interest does not translate into a justification for state—or even federal—regulation of advertising transmitted by cable systems.

[20] Cap. Cities Br. at 29-37.

[21] Resp. Br. at 95-99.

ment is without merit. It is undisputed that deletion of the advertisements is forbidden by non-deletion requirements included in the Federal Communications Commission's regulations and in the federal Copyright Act of 1976.[22]

Moreover, the technical and economic barriers to commercial deletion are severe, and well-documented in the record.[23] In arguing that these barriers are irrelevant, respondent ignores this Court's traditional sensitivity in the First Amendment area to economic and other factors that can restrain protected expression. The imposition of economic burdens that effectively curtail speech violates the First Amendment as surely as direct prohibition.[24]

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[22] As we discuss below, respondent's suggestion that these requirements cannot be relied on here because they are unconstitutional is wholly misplaced. *See* pages 9-14, *infra*. *See also* Cap. Cities Br. at 5, 29-30.

[23] *See* Cap. Cities Br. at 30-31. Respondent's argument also overlooks technical factors which indeed make impossible the complete and instantaneous deletion of wine advertisements. The experimental study relied on by respondent to show the feasibility of the deletions, *Cable Television Report and Order*, 36 F.C.C.2d 143, 156 (1972), actually demonstrates the opposite. That study was conducted in order to determine the feasibility of deleting commercials from distant signals and substituting local advertisements. The Commission found that commercial deletions were possible only with the "close cooperation" of broadcasters and were "dependent on visual and audio cues in the program material" to alert cable operators to an upcoming commercial. *Id.* at 165, 156. Because it concluded that cable operators would be unable to secure the necessary cooperation of broadcasters, the Commission decided not to adopt rules which would have required the deletion of commercial messages in distant signals. *Id.* at 165. It is undisputed that petitioners here receive no advance warning or "visual or audio cues" from broadcasters or programming services to indicate when a wine commercial will appear. *See* Cap. Cities Br. at 30.

[24] *See, e.g., Linmark Associates, Inc. v. Willingboro*, 431 U.S. at 93; *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964); *Martin v. Struthers*, 319 U.S. 141, 146 (1943). *See generally*

Because, as the district court found here, the burdens imposed on cable operators by the Oklahoma ban would leave them "no feasible way" to carry out-of-state programming that contains wine advertisements,[25] the ban is as offensive to the First Amendment as a direct ban on the programming itself.

III. RESPONDENT HAS SHOWN NO REASON WHY, IN THE FACE OF DIRECT CONFLICT WITH FEDERAL LAW AND POLICIES, THE BAN IS NOT PREEMPTED.

1. Respondent concedes that the Oklahoma ban directly conflicts with provisions of the Copyright Act[26] and of the cable regulations of the Federal Communications Commission[27] that prevent cable operators from deleting advertisements.[28] Respondent attempts initially to sidestep this conflict by claiming that the non-deletion provisions cannot furnish a basis for preemption because they violate the First Amendment rights of cable operators.[29] Respondent, however, is not the proper party to raise such a claim.

Respondent alleges no injury to his own interests as a result of the provisions' alleged unconstitutionality suffi-

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Buckley v. Valeo, 424 U.S. 1 (1976); *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 103 S. Ct. 1365 (1983); *Grosjean v. American Press Co.*, 297 U.S. 233 (1936). *See also Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, 383, 390 (1973); *Nebraska Press Association v. Stuart*, 427 U.S. 539, 610 (1976) (Brennan, J., concurring).

[25] Pet. App. G at 41a.

[26] 17 U.S.C. § 111(c)(3); § 111(b)(3) (1982).

[27] 47 C.F.R. § 76.55(b) (1982).

[28] Resp. Br. at 59.

[29] Id. at 19-24. Respondent does not challenge the constitutionality of the "must carry" rules themselves, only of the companion requirement that when any broadcast signals are carried, they must be carried in full.

cient to present a justiciable "case or controversy" within the meaning of Article III. *Linda R. S. v. Richard D.*, 410 U.S. 614, 616-18 (1973); *Baker v. Carr*, 369 U.S. 186, 204 (1962). The sole injury identified by respondent is "elimination of the cable operators' editorial discretion."[30] Yet it is well established that a litigant who is not himself injured "may not seek redress for injuries done to others." *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 166 (1972).[31]

It is particularly inappropriate for respondent to suggest that federal provisions should be held unconstitutional in this case because they violate the constitutional rights of these petitioners and other cable operators, a claim that petitioners are not themselves asserting. Moreover, if the federal non-deletion restrictions were unconstitutional,[32] it would seem necessarily to follow that Oklahoma's affirmative ban on speech at issue in this case would surely violate the First Amendment. It is bizarre for respondent to plead First Amendment protection of cable operators in defense of a State statute that suppresses cable operators' speech.

2. Respondent next argues that a "traditional Preemption or Supremacy Clause analysis" is not appropriate in

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[30] Resp. Br. at 23.

[31] *See also Heald v. District of Columbia*, 259 U.S. 114, 123 (1922) (Brandeis, J.) ("one who would strike down [an act of Congress] as violative of the Federal Constitution must show . . . that the alleged unconstitutional feature injures him"); *California Bankers Association v. Shultz*, 416 U.S. 21, 51 (1974) (bank not injured by regulation abridging depositors' Fourth Amendment rights).

Even if injury to respondent could be established, respondent's claim "falls squarely within the prudential standing rule that normally bars litigants from asserting the rights or legal interests of others in order to obtain relief from injury to themselves." *Warth v. Seldin*, 422 U.S. 490, 509 (1975); *id.* at 500 n.12.

[32] It is particularly difficult to see how the non-deletion requirement in the Copyright Act, a condition of copyright licenses, could violate the First Amendment.

this case despite the direct and admitted conflict between the State and federal provisions.[33] Respondent contends that because the State law in question concerns liquor, the analysis "must begin with a presumption of State power," [34] and claims that this Court's precedents dictate use of a "balancing test" to determine whether the State ban or the federal provisions ought to prevail.[35] Respondent also suggests, without support, that the invalidation of the federal requirements would result in "no social harm." [36]

Respondent grossly misperceives the nature of the Twenty-first Amendment's impact on federal power. The cases cited by respondent in which a federal law or action was alleged to conflict with the Twenty-first Amendment all concerned laws or actions that purposefully regulated commerce in liquor. *See, e.g., California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964).[37] Even with respect to this type of federal action, the Court has consistently held that the Twenty-first Amendment does not oust Congress from the field of liquor regulation under the Commerce Clause so long as the federal action does not unduly intrude upon a core area of liquor regulation expressly committed to the states by the Twenty-first Amendment: "transportation or importation . . . for delivery or use." *See, e.g., California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. at 110. This Court has

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[33] Resp. Br. at 26.

[34] Id.

[35] Id. at 44.

[36] Id. at 65.

[37] The other cases primarily relied on by respondent involved attacks made on state liquor laws under the dormant Commerce Clause. *See, e.g., State Board v. Young's Market Co.*, 299 U.S. 59 (1936). Such cases have no relevance where, as here, Congress has acted.

never invalidated any federal regulation of commerce in liquor as violating the Twenty-first Amendment.[38]

In any event, this case does not involve federal action taken under the Commerce Clause to regulate commerce in liquor and the Twenty-first Amendment therefore cannot be argued to limit federal power. The Copyright Act was enacted pursuant to the Copyright Clause, and the Twenty-first Amendment plainly works no diminution in Congress' power to legislate under the Copyright Clause. *See, e.g., Craig v. Boren*, 420 U.S. 190, 206 (1976); *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341, 343 (1964). Conflicting state laws are necessarily preempted. *Goldstein v. California*, 412 U.S. 546, 570 (1973).[39]

Similarly, here Congress in the Communications Act has not drawn upon its power under the Commerce Clause to regulate commerce in liquor; rather the Commission, acting under federal authority, has sought to regulate cable television.[40] Respondent cites no case, and we are aware of none, holding that balancing is appropriate where a state liquor law directly conflicts with a federal law passed under the Commerce Clause but not having as its purpose the regulation of liquor.[41] Under respondent's

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[38] *See California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964); *William Jameson & Co. v. Morgenthau*, 307 U.S. 171 (1939); *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518 (1938); *United States v. Frankfort Distilleries, Inc.*, 324 U.S. 293 (1945); *United States v. State Tax Commission of Mississippi*, 412 U.S. 363 (1973), 421 U.S. 599 (1975).

[39] *See also* Comment, *supra* note 9, at 876-77.

[40] Respondent acknowledges that neither Congress nor the Commission had any intention of regulating commerce in liquor through the Communications Act and regulations issued thereunder. Resp. Br. at 66-67.

[41] The only case cited by respondent in which a federal regulation has been struck down on the basis of the Twenty-first Amendment is

expansive reading of the Twenty-first Amendment, the Amendment would effectively repeal the Supremacy Clause whenever an act of Congress—no matter how far removed from liquor regulation—had an incidental effect on a state regulation related to alcoholic beverages.

3. Respondent also argues that the Copyright Act and the Communications Act were not meant to occupy their respective fields.[42] However, both this contention and the cases cited by respondent are irrelevant. Petitioner has never argued that Congress intended to preempt the entire cable or copyright fields, only to preempt the limited area of cable signal regulation.[43] No case cited by respondent suggests that Congress may not preempt this limited area, as it has done through the Commission. Moreover, even if there were no intent to occupy a portion of the field, the State law cannot survive the direct conflict with federal law and regulations that exists here.[44]

4. Finally, respondent claims that the Oklahoma ban would not "undermine[] . . . Congress' intent . . . to create a nationwide scheme of compulsory licensing" in the Copyright Act.[45] The truth is that there could be *no*

Castlewood International Corp. v. Simon, 596 F.2d 638 (5th Cir. 1979), *vacated and remanded*, 446 U.S. 949 (1980), *panel opinion reinstated*, 626 F.2d 1200 (5th Cir. 1980). Since the federal action in *Castlewood* (regulating relationships between retailers and wholesalers) directly regulated commerce in liquor, the case is inapposite here.

[42] Resp. Br. at 48-59.

[43] Cap. Cities Br. at 40-42.

[44] Respondent's cases do not establish the contrary. In *Goldstein v. California*, 412 U.S. 546, 570 (1973), there arose "[n]o . . . conflict between state law and federal law." Similarly, even respondent recognizes that *Head v. New Mexico Board of Examiners in Optometry*, 374 U.S. 424 (1963), turned on "the absence of any direct conflict between the State advertising regulation and some specific element of [the Communications Act]." Resp. Br. at 50-51. *See also Roth v. Pritikin*, 710 F.2d 934 (2d Cir.), *cert. denied*, 104 S. Ct. 394 (1983).

[45] Resp. Br. at 55.

compulsory licensing of out-of-state commercial signals in Oklahoma if the ban is enforced against cable operators doing business there. If Oklahoma cable operators cannot adhere to Congress' demand that they make no commercial alterations or substitutions, they will lose the right to retransmit distant broadcast signals pursuant to compulsory licenses from program suppliers. Instead, the only way they could continue to show distant broadcast programs to their viewers would be to purchase from each program's copyright holder the right to retransmit the program. Yet it was just such a system which Congress rejected as impractical and unduly burdensome because, aside from the time and money that would be expended by cable operators, many copyright holders were unlikely to give retransmission consent. *See* H.R. Rep. No. 1476, 94th Cong., 2d Sess. 89 (1976).[46]

CONCLUSION

For the foregoing reasons and those stated in our opening brief, the decision of the court of appeals should be reversed.

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[46] The Commission also has rejected such a scheme. *See Memorandum Opinion and Order*, 79 F.C.C.2d 652, 803, *aff'd, Malrite T.V. v. FCC*, 652 F.2d 1140, 1146-47 (2d Cir. 1980); *Cable Television Report and Order*, 36 F.C.C.2d 143, 164 (1972).

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No. 82-1795

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CAPITAL CITIES CABLE, INC.; COX CABLE OF OKLAHOMA CITY, INC.; MULTIMEDIA CABLEVISION, INC.; AND SAMMONS COMMUNICATIONS, INC.,
Petitioners,

v.

RICHARD A. CRISP, DIRECTOR, OKLAHOMA ALCOHOLIC BEVERAGE CONTROL BOARD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

REPLY BRIEF FOR PETITIONERS COX CABLE OF OKLAHOMA CITY, INC., MULTIMEDIA CABLEVISION, INC., SAMMONS COMMUNICATIONS, INC.

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REPLY BRIEF FOR PETITIONERS COX CABLE OF OKLAHOMA CITY, INC., MULTIMEDIA CABLEVISION, INC., SAMMONS COMMUNICATIONS, INC.

I. OKLAHOMA'S ADVERTISING BAN IS PREEMPTED BY FEDERAL LAW.

Misconstruing *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) and *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964), Respondent asserts that traditional Supremacy Clause analysis is inapplicable because the Twenty-first Amendment creates state interests which must be balanced against the federal

interest in a nationwide communications policy.[1] In *Midcal* and *Hostetter* the Court addressed the effect of the Twenty-first Amendment on the federal government's power to regulate liquor commerce, declaring that the competing federal and state interests in the Commerce Clause and Twenty-first Amendment must be reconciled.[2] The present case presents no such conflict between federal and state powers over liquor commerce.[3] Rather, the federal interest concerns a uniform, nationwide communications system which protects the rights of viewers, copyright owners, advertisers and cable operators. Consequently, a balancing of interests is inappropriate, and directly conflicting federal laws render application of the Oklahoma advertising ban to Petitioners invalid.[4]

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[1] Brief of Respondent ("Resp. Br.") at 44.

[2] The Court in *Hostetter* sought to avoid the "patently bizarre" and "demonstrably incorrect" conclusion that the Twenty-first Amendment left Congress "with no regulatory power over interstate or foreign commerce." 337 U.S. at 332. Similarly, in *Midcal*, reconciliation of the competing state and federal interests was suggested because "there is no bright line between federal and state powers over liquor." 445 U.S. at 110.

[3] For this reason *Castlewood Int'l Corp. v. Simon*, 596 F.2d 638 (5th Cir. 1979), *vacated and remanded sub nom. Miller v. Castlewood Int'l Corp.*, 446 U.S. 949, *panel opinion reinstated*, 626 F.2d 1200 (5th Cir. 1980), is inapplicable because the federal provision there directly regulated liquor commerce. *See United States v. Texas*, 695 F.2d 136, 139 (5th Cir.), *cert. denied*, ____ U.S. ____, 104 S.Ct. 336 (1983), where the Fifth Circuit emphasized the narrow limits of its holding in *Castlewood*. *See also Dunagin v. City of Oxford*, 718 F.2d 738, 753 (5th Cir. 1983) (en banc) where the Fifth Circuit found it "exceedingly unlikely" that the Twenty-first Amendment could justify the State of Mississippi's banning all out-of-state cable signals containing liquor advertisements in the face of, *inter alia*, the Supremacy Clause.

[4] Respondent's reading of *Midcal* is similarly flawed to the extent it interprets that decision to support a liquor advertising ban as incident to the state's powers under the Twenty-first Amendment. Resp. Br. at 32. Neither *Midcal* nor any other decision of this Court has held or implied that regulation of interstate liquor advertising by entities not engaged in liquor commerce is incident to the state's power to regulate the transportation and importation of alcoholic beverages. Rather, this Court has repeatedly found that Section 2 of the Twenty-first Amendment was "designed only to augment the powers of the States to regulate the importation of liquor destined for use, distribution or consumption in its own territory, not to 'increase its jurisdiction.'" *United States v. Tax Comm'n of Mississippi*, 412 U.S. 363, 378 (1973) (quoting *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518, 538 (1938)).

Even if balancing is appropriate, Respondent misstates the test. The state's interest in promoting temperance *per se* is not balanced against the federal interest in a uniform, nationwide communications policy. Rather, the Court must measure the demonstrated effectiveness of the advertising prohibition in advancing the state's interest against the federal interest. *Midcal*, 445 U.S. at 113-114. The effectiveness of Oklahoma's blanket advertising ban as applied to cable television programming is "unsubstantiated." *Id.* Respondent made no factual showing that application of the advertising ban to cable television programming will assist in achieving the state's goals. Widespread availability in Oklahoma of other media containing liquor advertisements, and the fact that the state only recently attempted to enforce the prohibition against Petitioners, show that the advertising ban does not cognizably further the state's interest.[5] Thus, under *Midcal*, application of the advertising ban to Petitioners is invalid.

II. OKLAHOMA'S ADVERTISING BAN VIOLATES THE FIRST AMENDMENT.

Taking great liberty with the record, Respondent argues that it is "not impossible" for cable operators to delete wine commercials from their programming, so that Oklahoma's advertising ban does not "materially affect the dissemination of non-commercial or other commercial programming."[6] The undisputed testimony in the record shows that deleting wine commercials would be "extremely impractical" and would have "[a] very heavy economic effect" on cable operations.[7] The District Court found that "there exists no feasible way for . . . [cable operators] to block out the [wine] advertisements."[8] The Tenth Circuit did not disturb this finding but

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[5] In striking down the application of Oklahoma's advertising prohibition to Petitioners, the District Court recognized that Petitioners "are prohibited from disseminating advertisements of something the public already knows from experience and from reading newspaper and magazine advertising—that alcoholic beverages exist and are for sale at certain prices." Appendix to the Petition for Certiorari ("PA") at 45a. *See also* PA at 5a n.1, 23a-24a.

[6] Resp. Br. at 97, 99.

[7] Joint Appendix ("JA") at 26, 30, *see also id.* at 29, 32, 37, 39.

[8] PA at 41a.

echoed the District Court, concluding that "cable operators especially are placed in a difficult position" because of the advertising prohibition. *Oklahoma Telecasters Ass'n v. Crisp*, 699 F.2d 490, 502 (10th Cir. 1983). The FCC also concluded, contrary to Respondent's assertions, that deletion of commercials by cable operators is unworkable, *Cable Television Report and Order*, 36 F.C.C.2d 143, 165 (1972), and would be a "prohibitively burdensome task."[9]

Semantic arguments over the words "impracticable," "impossible" and "infeasible" are not helpful. Because of the economic and technical burdens of deleting wine advertising from cable programming, Oklahoma's sweeping prohibition, if upheld, would prevent cable operators from carrying out-of-state signals that contain an abundance of political and artistic expression and a variety of commercial messages for products and services other than alcoholic beverages.[10] This is an unjustified prior restraint on cable operators' editorial discretion.[11]

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[9] *See* Brief of the Federal Communications Commission as Amicus Curiae Supporting Petitioners at 16.

[10] Regardless of the particular label attached to speech, this Court "may not escape the task of assessing the First Amendment interest at stake." *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85, 91 (1977). Every restriction on commercial speech "must be examined carefully to ensure that speech deserving of greater constitutional protection is not inadvertently suppressed." *Bolger v. Youngs Drug Products Corp.*, ____ U.S. ____, 103 S.Ct. 2875, 2880 (1983); *see also Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 570 (1980).

[11] *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 569-570 (1976); *New York Times Co. v. United States*, 403 U.S. 713 (1971). Even if the advertising ban affected only wine commercials on cable programming, the state's prohibition must nevertheless fail. The blanket restriction on the "free flow of truthful information" concerning alcoholic beverages "constitutes a 'basic' constitutional defect regardless of the strength of the government's interest." *Bolger*, 103 S.Ct. at 2885 (quoting *Linmark*, 431 U.S. at 95-96).

Respondent argues that the prohibited advertising is entitled to reduced constitutional protection because it is delivered by the electronic media. Resp. Br. at 68-71. Whatever may be the parameters of legitimate governmental regulation of the television broadcast medium with its scarcity of frequencies,

(footnote continues)

Respondent argues that actual proof of the advertising ban's directly advancing the state's interest is not required if the legislative judgment underlying the prohibition is not "manifestly unreasonable."[12] This Court's decisions do not support Respondent's reliance on legislative reasonableness to sustain its burden of justifying a restriction on commercial speech.[13] Moreover, this Court has consistently rejected the notion that judicial deference to legislative judgment is required under the Twenty-first Amendment where liquor regulations substantially interfere with constitutional guarantees.[14]

Respondent also argues that the advertising ban is no more extensive than necessary to further the state's interest in re-

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(footnote continued)

see e.g., Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 101 (1973), such limits are inapplicable to the cable television medium, *see Bolger*, 103 S.Ct. at 2884, and, in any event, are exceeded where, as here, the state severely impedes the free flow of political and artistic programming merely because it includes truthful commercial advertising for wine products.

[12] Resp. Br. at 87-89.

[13] *See e.g., Bolger*, 103 S.Ct. at 2882 n.20, 2884; *Central Hudson*, 447 U.S. at 569 (Court rejects as "tenuous" state agency determination that an advertising ban advanced state's interest in equitable and efficient utility rates). *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), does not require a different conclusion. Unlike the regulation involved here, the billboard ban in *Metromedia* did not single out speech of a particular content, and the Court specifically noted the absence of any claim that San Diego was attempting to suppress speech. *Id.* at 510. Considering the First Amendment's hostility to content-based regulation, judicial deference to rational legislative judgments is inappropriate where, as here, the state regulation is based on the subject matter of the speech. *Id.* at 519; *Schneider v. New Jersey*, 308 U.S. 147, 161; *see also Metromedia*, 453 U.S. at 528-531 (Brennan, J., concurring in judgment); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 72-74 (1981).

[14] *See e.g., Larkin v. Grendel's Den, Inc.*, ____ U.S. ____, 103 S.Ct. 505, 510 (1982) (deference to legislative judgment not required when liquor regulation violates the Establishment Clause of the First Amendment); *Craig v. Boren*, 429 U.S. 190, 200-04, 206 (1976) (rejecting legislative judgment that gender-based liquor regulation promoted traffic safety); *cf. California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 112-14 (1980) (rejecting state legislative judgment that liquor resale price maintenance promoted temperance and orderly market conditions).

ducing alcohol consumption and intemperance among its population.[15] The record in this case makes such an argument untenable. There is no showing by the state that less restrictive measures would be ineffective, as required by *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 570-71 (1980). Nothing in the record describes a failed effort by the state to proceed along a less restrictive path. *See In re R.M.J.*, 455 U.S. 191, 201 (1982). As the District Court found, "[i]t is not clear that an absolute prohibition of advertising is the only solution."[16] Absent such a showing, the state failed its burden under *Central Hudson*. *See Bolger v. Youngs Drug Products Corp.*, ____U.S.____, 103 S.Ct. 2875, 2882 n.20 (1983); *R.M.J.*, 455 U.S. at 201.[17]

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[15] Resp. Br. at 91-94.

[16] PA at 49a.

[17] Respondent also argues that FCC regulations and federal copyright law prohibiting commercial deletions unconstitutionally abridge Petitioners' editorial discretion. Resp. Br. at 19-25. Respondent failed to raise this argument in the lower courts and therefore cannot do so here. *See, e.g., Andrews v. Louisville & Nashville R.R.*, 406 U.S. 320, 324-25 (1972); *Wiener v. United States*, 357 U.S. 349, 351 (1958); *see also* Sup. Ct. R. 21.1(a). Additionally, Respondent has no standing to challenge the constitutional validity of these federal provisions, even under the most strained interpretation of the "overbreadth" doctrine. *New York v. Ferber*, 458 U.S. 747, 767-73 (1982); *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973). Moreover, Respondent's position is self-defeating because the Oklahoma advertising ban, if enforced, would interfere with Petitioners' editorial discretion more than the federal regulation, and would thus be invalid under the same rationale.

CONCLUSION

For the foregoing reasons, and for the reasons stated in Petitioners' initial brief, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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RICHARD A. CRISP, DIRECTOR
OKLAHOMA ALCOHOLIC BEVERAGE CONTROL BOARD,

Respondent.

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BRIEF OF THE AMERICAN ADVERTISING FEDERATION, AMERICAN ASSOCIATION OF ADVERTISING AGENCIES, ASSOCIATION OF NATIONAL ADVERTISERS AND THE OUTDOOR ADVERTISING ASSOCIATION OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF THE AMERICAN ADVERTISING FEDERATION, AMERICAN ASSOCIATION OF ADVERTISING AGENCIES, ASSOCIATION OF NATIONAL ADVERTISERS AND THE OUTDOOR ADVERTISING ASSOCIATION OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF AMICI CURIAE

This brief is submitted jointly by the American Advertising Federation, the American Association of Advertising Agencies (AAAA), the Association of National Advertisers (ANA) and the Outdoor Advertising Association of America (OAAA) as amici curiae. Amici have secured the consent of each party to the filing of this brief.

See Appendix. Amici support the position of appellants in this case and urge reversal of the decision below.

The American Advertising Federation is a national trade association which includes within its membership representatives of all of the various elements of the advertising industry. The membership of the Federation includes companies which manufacture and sell consumer products, advertising agencies, outdoor advertising companies, newspaper and magazine publishers, radio and television broadcasters and networks and approximately 22 other trade associations with memberships composed of companies engaged in various advertising pursuits. The Federation is also the parent body of more than 200 local advertising clubs and federations located throughout the United States which have a combined membership of approximately 25,000 advertising practitioners.

The American Association of Advertising Agencies is the national association of the advertising agency industry. The AAAA has more than 590 members which include both large and small advertising agencies located throughout the United States. These companies are responsible for approximately 75 percent of all national advertising placed by advertising agencies in this country as well as a great deal of the local and regional advertising in the United States.

The Association of National Advertisers is a national association comprised of approximately 400 companies located throughout the United States which manufacture and sell a wide range of products and which employ advertising as an important element of their marketing and public relations programs. Although the ANA's membership includes many of the nation's largest advertisers, it also includes a large number of smaller advertisers who

expend less than $1 million annually for advertising. The common characteristic of all ANA members is that they purchase space and time from the media of mass communications for proprietary advertising.

The OAAA is the trade association of the standardized outdoor advertising industry in the United States. Outdoor advertisers maintain off-premise posters and painted bulletins which disseminate commercial and noncommercial messages that do not pertain to activities conducted on the premises on which the outdoor advertising signs are located. The OAAA's membership is composed of one hundred sixty-nine companies which serve 7,900 distinct local areas throughout the United States.

The combined membership of amici are responsible for the majority of advertising expenditures in the United States. In addition each of the amici has members that are located within the State of Oklahoma or place advertising in media within the state. A substantial number of these members are directly affected by the Oklahoma statutes at issue in this case and have been prohibited from disseminating alcoholic beverage advertising.

Amici have a direct interest in this case because it presents the issue of whether a state may totally suppress commercial speech regarding a product which may be sold lawfully within the state. If the Court's disposition of this appeal reaches this issue, the Court's opinion will determine whether the Twenty-first Amendment compromises the protection afforded to commercial speech by the First and Fourteenth Amendments, and may also delineate the more general circumstances under which a state may prohibit truthful advertising of any lawful product or service. The business of each Amici's membership is the dissemination of commercial speech. As a result, the Court's decision in this case will have a deci-

sive impact upon them insofar as it treats commercial speech issues.

ARGUMENT

This case is overshadowed by the Twenty-first Amendment and the traditional discretion accorded to the states in regulating commerce with respect to alcoholic beverages. *Ziffrin, Inc.* v. *Reeves*, 308 U.S. 132 (1939). In upholding Oklahoma's total prohibition of the advertising of alcoholic beverages, the Tenth Circuit yielded to the undertow of that tradition and extended the special police powers inherent in the Twenty-first Amendment beyond direct regulation of commerce to allow a State to negate fundamental First Amendment rights.

The decisions of this Court have rejected state actions which proscribe rights guaranteed by the Bill of Rights and the Fourteenth Amendment under the guise of Twnety-first Amendment regulation. The deference accorded state regulation of intoxicating beverages because of the Twenty-first Amendment is properly limited to the exercise of police powers that might otherwise be in conflict with the Commerce Clause. Certainly, such deference does not provide a rationale for state action which would completely prohibit protected commercial speech.

The very fact that the Twenty-first Amendment greatly enlarges state police powers to directly control the sale, consumption and transportation of alcoholic beverages undercuts the Tenth Circuit's conclusion that the Oklahoma advertising ban is no more extensive than necessary to further the state's interest in temperance. *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980). Given the broad spectrum of alternative means available to Oklahoma to control the sale of alcoholic beverages, it is difficult to envision how

the total prohibition of protected commercial speech regarding these products could constitute the least restrictive method of restraining alcohol consumption.

I. THE TWENTY-FIRST AMENDMENT DOES NOT GIVE A STATE AUTHORITY TO REGULATE COMMERCIAL SPEECH IN A MANNER THAT WOULD OTHERWISE BE UNCONSTITUTIONAL

The Tenth Circuit's decision hinges on its conclusion that the Twenty-first Amendment gives a state the power to compromise constitutional rights granted by the First and Fourteenth Amendments. A review of decisions by this Court interpreting the Twenty-first Amendment establishes that the Amendment simply gave the states added police power to control the sale and distribution of intoxicating liquor by creating an exception to the Commerce Clause. However, that authority does not give the states a carte blanche to extend into areas of regulation otherwise precluded by the Bill of Rights and the Fourteenth Amendment.

A. The Twenty-first Amendment Does Not Authorize A State To Eliminate Rights Guaranteed By The Bill Of Rights

This Court has already determined that the scope of the Twenty-first Amendment is confined to regulatory activity which has a direct linkage to alcoholic beverage control and that the force of that Amendment becomes quickly attenuated when this activity impinges on fundamental rights. In *Craig* v. *Boren*, 429 U.S. 190 (1976), this Court refused to accord any deference based on the Twenty-first Amendment to an Oklahoma gender based restriction on the sale of alcoholic beverages.

This Court's decisions since have confirmed that the Amendment primarily created an exception to the normal operation of the Commerce Clause.

> Once passing beyond consideration of the Commerce Clause, the relevance of the Twenty-first Amendment to other constitutional provisions becomes increasingly doubtful. As one commentator has remarked: "Neither the text nor the history of the Twenty-first Amendment suggests that it qualifies individual rights protected by the Bill of Rights and the Fourteenth Amendment where the sale or use of alcohol is concerned". . . . Any departures from this historical view have been limited and sporadic. [Citations omitted]

Id. at 429 U.S. 206.

In *Wisconsin* v. *Constantineau*, 400 U.S. 433 (1971), this Court held unconstitutional a Wisconsin law that allowed local officials to summarily prohibit sales or gifts of alcoholic beverages to individuals. In that decision, the Court expressly rejected Twenty-first Amendment considerations as having any weight and held that the law violated the due process rights of the individuals involved. During the last term of the Court, a Massachusetts liquor control law was reviewed which permitted religious institutions to veto applications for liquor licenses where the proposed establishments would be located within a certain distance from their premises. *Larkin* v. *Grendl's Den*, 103 S.Ct. 505 (1982). While noting that judicial deference to the legislative exercise of zoning powers by a city council or other legislative zoning body is especially appropriate in the area of liquor regulation because of the Twenty-first Amendment, the Court nonetheless held that the Massachusetts law violated the Establishment Clause of the First Amendment. *Id.* at 103 S.Ct. 510. "Under these circumstances the deference normally due a legislative zoning judgment is not merited." *Id.*

B. The States Do Not Have Authority Under The Twenty-First Amendment To Completely Ban Protected Speech

In the decision below, the Court of Appeals for the Tenth Circuit acknowledged that "[t]he Twenty-first Amendment did not grant to the states the authority to abrogate individual rights guaranteed by the Fourteenth Amendment." *Oklahoma Telecasters Association* v. *Crisp*, 699 F.2d 490, 498 (10th Cir. 1983). But having stated this, the Tenth Circuit then sought to generalize from cases which have permitted a state to exercise control over the sale or consumption of alcoholic beverages in a manner which may have impacted on speech and held that a state may directly prohibit *all* commercial speech in this area simply because the Twenty-first Amendment is involved. This is reflected in the Circuit Court's reliance upon *New York State Liquor Authority* v. *Bellanca*, 452 U.S. 714 (1981).

In *Bellanca*, nightclub and restaurant owners attacked a New York State prohibition on nude dancing in establishments licensed by the State to sell liquor for on-premise consumption. Superficially, *Bellanca* appears to support the contention that the Twenty-first Amendment requires added deference for broad-based state restrictions on First Amendment rights. But it is essential to recognize that the regulations at issue in *Bellanca* were directed at controlling the locations at which alcohol could be sold and consumed and did not attempt to effect a total ban on the protected expression itself. By contrast, the Oklahoma ban on alcoholic beverage advertising is a direct and pervasive prohibition of constitutionally protected speech which precludes all such expression within the state. If there is any deference to be paid under the Twenty-first Amendment to speech-related restrictions,

that latitude is necessarily narrow and does not extend to the complete suppression of protected speech.

Likewise, the Court below placed its heaviest reliance for its decision on this Court's summary dismissal of an appeal of the decision of the Ohio Supreme Court in *Queensgate Investment Co.* v. *Liquor Control Commission*, 69 Ohio St.2d 361, 43 N.E.2d 137 (1982), *appeal dismissed*, 103 S.Ct. 31 (1982). Obviously this case has limited precedential value because this Court never issued an opinion on the merits. But a close review of the Ohio Supreme Court's reasoning reveals that nowhere in its opinion did the Court suggest that the Ohio ban on advertising of alcoholic beverage prices was entitled to greater deference because of the Twenty-first Amendment. Rather, the Court reviewed the ordinance under a strict *Central Hudson* analysis. The sole reference to the Twenty-first Amendment arose in the context of using the Twenty-first Amendment as support for a finding that the state had a substantial interest in controlling alcohol consumption. *Queensgate*, *supra*, at 43 N.E.2d 142.

Even if *Queensgate* is viewed as a decision regarding permissible Twenty-first Amendment regulation which impacts on protected expression, the Ohio decision still does not lend support for a total advertising ban like that at issue in the instant case. Unlike Oklahoma's sweeping prohibition, the Ohio regulation was limited to proscriptions on off-premise price advertising of per drink or per bottle prices or of comparative prices by certain permit holders. Under the Ohio ordinance, permit holders could continue to advertise virtually any other information except price, and liquor distributors were not subject to any restrictions.

The Twenty-first Amendment provides no better justification for the complete suppression of protected speech than it does for the suppression of equal protection and due process rights or for evasions of the Establishment Clause. The First Amendment may not be so easily overcome.

II. OKLAHOMA'S BAN ON ALCOHOLIC BEVERAGE ADVERTISING CANNOT BE SUSTAINED AS A PROPER REGULATION OF COMMERCIAL SPEECH

It is well settled that commercial speech is protected under the First Amendment. *Bigelow* v. *Virginia*, 421 U.S. 809 (1975), *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council*, 425 U.S. 748 (1976). In *Central Hudson Gas Co.* v. *Public Service Commission*, *supra*, this Court carefully delineated the narrow circumstances under which commercial speech may be regulated.

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than necessary to serve that interest.

Central Hudson, *supra* at 477 U.S. 566.

The Circuit Court misapplied this test because it intermeshed Twenty-first Amendment considerations within its First Amendment analysis. Thus, the Tenth Circuit found that Oklahoma's prohibitions conformed to the two final *Central Hudson* criteria "[w]hen the Twenty-first Amendment is considered in addition to Oklahoma's sub-

stantial interest under its police power. . . ." *Crisp, supra*, at 699 F.2d 502. In fact, this Court's Twenty-first Amendment decisions compel that a *Central Hudson* analysis of complete prohibitions of protected speech must be concluded free of Twenty-first Amendment taint. When viewed in that clearer light, Oklahoma's prohibitions simply do not pass constitutional muster.

A. The Oklahoma Advertising Ban Does Not Directly Advance The State's Goal Of Reducing Alcohol Consumption

The District Court below correctly held that Oklahoma's ban[1] failed to satisfy the third part of the *Central Hudson* analysis since the ban does not directly advance Oklahoma's goal of temperance.

> The realities of the situation are that beer commercials have been permitted despite the ban; wine commercials are heard in Oklahoma on radio broadcasts which originate outside the state; beer, wine, and distilled spirits advertisements in magazines originating outside Oklahoma are permitted. The Court finds it hard to believe that the prohibition of advertising by Oklahoma media is a direct means of achieving temperance.

Oklahoma Telecasters Association v. *Crisp*, No. Civ-81-439-W (W.D. Ok. December 18, 1981).

The Tenth Circuit rejected the District Court's analysis and, deferring to the legislative judgments underlying the statute, limited its consideration to whether it was

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[1] Oklahoma has taken the position that its laws prohibit both interstate and intrastate advertising of intoxicating liquors, but that due to enforcement practicalities, it has not been able to pursue violations in the form of liquor advertisements included in out-of-state publications distributed in Oklahoma. Respondent's Brief in Opposition to Petition for Writ of Certiorari at 1-2.

unreasonable for Oklahoma to believe that product advertising increases sales of alcoholic beverages generally, rather than just sales of the particular brands advertised. *Crisp, supra*, at 699 F.2d 501.

This asserted deference to legislative judgments is not supported by the decisions of this Court. In *Central Hudson, supra*, this Court specifically refused to give any presumptive effect to underlying legislative judgments. Thus, New York had asserted as one of its substantial interests that promotional advertising would aggravate inequities in the utility rate structures because of the failure to base rates on marginal costs. This Court accepted the premise that the state had a substantial governmental interest in assuring the fairness of utility rate structures, but then engaged in a searching and critical inquiry into whether there was a concrete link between the advertising restrictions at issue and that state interest. The Court concluded that the link was highly speculative. "Such conditional and remote eventualities simply cannot justify silencing appellant's promotional advertising." *Central Hudson, supra*, at 447 U.S. 569.

In the recent decision in *Bolger* v. *Young Drug Products Corp.*, 103 S.Ct. 2875 (1983), this Court again looked behind ostensible legislative intent and conducted a searching analysis of whether a federal statutory ban on unsolicited contraceptive advertisements in the mail in fact furthered the governmental goal of aiding parents in controlling the manner their children become informed about birth control. There, the Court pointed out that these prohibitions should not be assessed in a vacuum and that the mail ban itself would not prevent children from receiving information from a host of other public information sources available to them in everyday life. *Id.* at 103 S.Ct. 2884.

In the instant case it is uncontested that Oklahoma residents are exposed to alcoholic beverage advertising from out-of-state media. Under these circumstances, it strains credulity to think that Oklahoma's total ban on intrastate advertising communications has more than a minimal and indirect effect—if it has any effect at all—on total alcohol consumption. Oklahoma's alcohol advertising prohibitions simply do not directly advance the State's interest in controlling consumption of alcoholic beverages and they cannot be accepted on face value as was done below.

B. The Oklahoma Advertising Ban Is Unconstitutional Because It Is More Restrictive Than Necessary To Further The State's Interest In Temperance

Regulations that suppress protected commercial speech must be no more extensive than necessary to serve an asserted governmental interest. *Central Hudson*, *supra*, at 447 U.S. 566. A flat ban on an entire category of protected commercial speech can only survive this test with the utmost difficulty. In *Central Hudson*, the Court struck down a blanket prohibition on promotion by electric utilities as being more restrictive than necessary to further the State's goal of energy conservation. The Court stated that "no showing has been made that a more limited restriction on the content of promotional advertising would not serve adequately the State's interest." *Central Hudson*, *supra* at 447 U.S. 570. The Court even suggested some less restrictive alternatives to an advertising ban and concluded, "[i]n the absence of a showing that more limited regulations would be ineffective, we cannot approve the complete suppression of Central Hudson's advertising." *Id.* at 447 U.S. 571. Likewise, in *In re R.M.J.*, 455 U.S. 191 (1982), this Court reviewed certain Missouri restrictions that prohibited lawyers

from sending announcements to more than a limited group of people in order to prevent "deception." This restriction was struck down as more restrictive than necessary. The Court pointed out that it was not clear that an absolute prohibition was the only solution to this problem and that there was no indication in the record "of a failed effort to proceed along such a less restrictive path." *In re R.M.J.*, *supra* at 455 U.S. 201.

Oklahoma's ban on alcohol advertising cannot be justified as being no more extensive than necessary to further the State's goal of temperance. First, there has been no showing that less restrictive measures would be ineffective, as required by *Central Hudson*, *supra*. Also, there is no indication of a failed effort to proceed along a less restrictive path. Moreover, to the extent that the Twenty-first Amendment has any relevance in this case, it is because the Amendment gives Oklahoma far more comprehensive police power to control alcohol sale and use than might otherwise be permitted under the Commerce Clause. In applying the *Central Hudson* analysis, the existence of that expanded police power places a greater burden on the state to justify the complete suppression of protected speech when a broad array of other measures that directly regulate sales and consumption are well within the states authority. Clearly Oklahoma has failed to carry that burden and has not even approached exhausting the spectrum of alternative controls available to it short of this total ban of commercial speech. The Oklahoma ban is not the least restrictive of the measures available to the State for achieving its goals of controlling alcohol consumption.

CONCLUSION

Oklahoma has banned alcoholic beverage advertising from all intrastate media and aspires to extend the ban to

the dissemination of such advertising in out-of-state media disseminated on cable TV within the state. The Twenty-first Amendment provides no support for giving greater deference to this suppression of protected commercial speech than to any other regulation of commercial speech. The Oklahoma advertising prohibition is unconstitutional under the First Amendment because it does not directly advance the State's goal of fostering temperance and it is far more restrictive than necessary to achieve that end, particularly because of the broad ambit of non-speech related measures available to the state to control alcoholic beverages.

Respectfully submitted,

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November 17, 1983

APPENDIX

WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006

November 14, 1983

By Hand

Eric Rubin, Esquire
Rubin, Winston & Diercks
1730 M Street, N.W.
Suite 708
Washington, D.C. 20036

Re: Capital Cities Cable, Inc., *et al.* v. *Crisp*, *No. 82-1795 (U.S. Supreme Court)*

Dear Mr. Rubin:

Petitioner Capital Cities Cable, Inc. hereby consents to the filing by the American Advertising Association, *et al.*, of a brief *amicus curiae* in the above-entitled case.

Sincerely,

/s/ TIMOTHY DYK
Timothy Dyk

DOW, LOHNES & ALBERTSON
Attorneys at Law
1225 Connecticut Avenue
Washington, D.C. 20036

November 14, 1983

By Hand

Walter Diercks, Esquire
Rubin, Winston & Diercks
1730 M Street, N.W.
Suite 708
Washington, D.C. 20036

Re: Capital Cities Cable, Inc. v. Crisp, *No. 82-1795 (U.S. Supreme Court)*

Dear Mr. Diercks:

Petitioners, Cox Cable of Oklahoma City, Inc., Multimedia Cablevision, Inc. and Sammons Communications, Inc., consent to the filing by the American Advertising Federation, the American Association of Advertising Agencies, the Association of National Advertisers, and the Outdoor Advertising Association of America of an amicus brief in the above-entitled case.

Sincerely,

/s/ DAVID P. FLEMING
David P. Fleming

DPF/gls

MICHAEL C. TURPEN
Attorney General
State of Oklahoma
State Capitol, Oklahoma City, Oklahoma 73105

November 7, 1983

Walter E. Diercks
1730 M Street, N.W.
Suite 708
Washington, D.C. 20036

Re: *Capital Cities Cable, Inc., et al.* v. *Crisp, No. 82-1795*

Dear Mr. Diercks,

In response to your letter dated November 1, 1983, consent is hereby given that the American Advertising Federation, American Association of Advertising Agencies, Association of National Advertisers and Outdoor Advertising Association of America may file briefs amicus curiae in the above captioned case.

Please feel free to contact me if I can be of further assistance.

Sincerely,

/s/ ROBERT L. MCDONALD, ESQUIRE
Robert L. McDonald, Esquire
First Assistant Attorney General

cm

FILED
NOV 17 1983
CLERK

No. 82-1795

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CAPITAL CITIES CABLE, INC.; COX CABLE OF OKLAHOMA CITY, INC.; MULTIMEDIA CABLEVISION, INC.; AND SAMMONS COMMUNICATIONS, INC.,

Petitioners,

—v.—

RICHARD A. CRISP, DIRECTOR, OKLAHOMA ALCOHOLIC BEVERAGE CONTROL BOARD,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF AMICI CURIAE THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF OKLAHOMA IN SUPPORT OF PETITIONERS

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November 17, 1983

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-1795

CAPITAL CITIES CABLE, INC.; COX CABLE OF OKLAHOMA CITY, INC.; MULTIMEDIA CABLEVISION, INC.; AND SAMMONS COMMUNICATIONS, INC.,

Petitioners,

—v.—

RICHARD A. CRISP, DIRECTOR, OKLAHOMA ALCOHOLIC BEVERAGE CONTROL BOARD,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF AMICI CURIAE THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF OKLAHOMA IN SUPPORT OF PETITIONERS

INTEREST OF AMICI CURIAE

The American Civil Liberties Union (the "ACLU") is a nationwide, non-partisan, non-profit membership organization of over 250,000 members dedicated to the promotion and defense of the fundamental personal liberties guaranteed by the Constitution of the United States. Foremost among these liberties is freedom of speech, protected by the first and

fourteenth amendments. The ACLU has appeared frequently in this Court and in other courts, as counsel for the parties and as amicus, in cases challenging governmental actions that threaten those liberties. Because the Oklahoma Constitution and statutes at issue here would impermissibly prohibit the broadcast of nonmisleading, commercial speech about a lawful product, and would thereby greatly reduce access in Oklahoma to commercial and non-commercial information generally available in other states,[1] we are filing this brief amici curiae, with the consent of the parties.[2]

STATEMENT OF THE CASE

The sale and consumption of alcoholic beverages is legal in the State of Oklahoma. Nevertheless, the Oklahoma Constitution and the Oklahoma Beverage Control Act impose a blanket ban on the advertising of alcoholic beverages, other than beer, within the state.[3]

As a result of this ban, local print media, radio and television broadcasters, and cable operators have long faced criminal prosecution if they solicited or accepted liquor advertisements. *Oklahoma Telecasters Association v. Crisp*, 699 F.2d

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1 Although the principal purpose of this brief is to discuss the impact of the Oklahoma prohibition on commercial speech, the ACLU also believes, for the reasons advanced by petitioners, and in the amici brief filed in support of the petitioners by the American Newspaper Publishers Association and Magazine Publishers Association, that the ban would unconstitutionally restrict non-commercial speech because it will effectively eliminate the broadcast of entire programs into Oklahoma.

2 The parties' letters of consent to our participation in this case have been filed with the Clerk of Court.

3 Okla. Const. art. 27, § 5; 37 Okla. Stat. Ann. tit. 37, § 516 (West Supp. 1982).

490, 492 (10th Cir. 1983).[4] In addition, network television affiliates were required to block out advertisements for wine before rebroadcasting network programming in Oklahoma, even though such advertisements were lawful in the states where they originated. *Id.* Until recently, however, the prohibition was not construed to apply to wine commercials included in programming relayed from outside of the state by Oklahoma cable operators. Nor was the ban applied to radio stations broadcasting into Oklahoma from outside the state, or to out-of-state publications distributed in Oklahoma. *Cable-Com General, Inc. v. Crisp*, Civ-81-290-W, slip op. at 14 (W. D. Okla. Feb. 10, 1982).

In May, 1980, the Oklahoma Attorney General issued an opinion declaring that distant signal transmissions carried over cable systems would no longer be exempted from the ban on wine advertising. *Id.*, slip op. at 8. Respondent Richard Crisp, Director of the Oklahoma Beverage Control Board, then threatened Oklahoma cable operators, including petitioners, with criminal prosecution if they continued to relay wine commercials into Oklahoma. *Id.*[5] Oklahoma admits that the law is intended to restrict alcohol consumption by reducing the flow of information about wine to Oklahoma residents. *Oklahoma Telecasters*, 699 F.2d at 500.

Federal regulations bar cable operators from altering any portion of the programs that they relay to their subscribers.[6]

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4 Only wine advertisements are, in practice, affected by this ban because broadcasters have generally chosen not to carry advertising for hard liquor, despite an absence of federal regulations on this issue.

5 No attempt was made at that time, nor has one been made subsequently, to enforce the ban against out-of-state radio broadcasters or publications.

6 Federal Communications Commission ("FCC") rules require cable operators to rebroadcast "in full, without deletion or alteration of any portion," 47 C.F.R. § 76.55(b) (1982), distant signal programming

Thus, the only way for Oklahoma cable operators to comply with the state's ban on wine commercials would be to delete entirely any program which contained such commercials. 699 F.2d at 492.

Seeking relief from this prohibitive burden, petitioner cable operators sought an injunction barring the state from enforcing its ban on wine commercials and a declaratory judgment that the ban violated their rights under the first and fourteenth amendments of the United States Constitution.[7]

The District Court for the Western District of Oklahoma granted the relief sought by petitioners. Rejecting the " 'highly paternalistic' approach that the state's protectiveness of its citizens rests in large measure on the advantages of their being kept in ignorance," *Cable-Com General*, slip op. at 9, the district court ruled that Oklahoma could not suppress totally wine commercials which were neither false nor misleading.

The district court rejected the state's argument that its power under the twenty-first amendment superseded the cable operators' right to free speech. Applying the four part test set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), it concluded that the Oklahoma ban violated the plaintiffs' first amendment rights. The ban did not directly advance the state's asserted interest in controlling alcohol abuse since beer commercials were allowed and wine advertisements carried by radio broadcasts, newspapers, and magazines which originated outside the state reached Oklahoma residents. Finally, the district court concluded that the Oklahoma ban was more extensive than neces-

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which they import for local viewing. This rule has been interpreted by the FCC to extend to television commercials. *See Garland B. Pugh*, 68 F.C.C.2d 997 (1978). The Copyright Act of 1976 imposes similar restrictions on deletion of television commercials by cable operators. 17 U.S.C. § 111(c)(3).

7 The Oklahoma Telecasters Association and several Oklahoma telecasters filed an identical suit in the same court.

sary to further the state's interest because less intrusive means of controlling alcohol consumption, including public education, were available. *Cable-Com General*, slip op. at 14-15.

The United States Court of Appeals for the Tenth Circuit reversed the judgment of the district court, holding that the Oklahoma ban did not violate the first and fourteenth amendments. *Oklahoma Telecasters*, 699 F.2d at 497. It found controlling this Court's summary dismissal in *Queensgate Investment Co. v. Liquor Control Commission*, 103 S. Ct. 31 (1982), of an appeal from a decision of the Ohio Supreme Court, 69 Ohio St. 2d 361, 433 N.E.2d 138 (1982), which upheld regulations of the Ohio Liquor Control Commission prohibiting off-premises retail price advertising by holders of certain liquor permits. The court further held that the advertising ban was a proper exercise of state authority under the twenty-first amendment.

Finally, the court purported to scrutinize the Oklahoma ban under the *Central Hudson* test. Yet because it believed substantial deference was owed to the state's power under the twenty-first amendment, the court applied little more than a rational basis test in finding that the Oklahoma prohibition directly advanced the state's interest in temperance and that it was no more extensive than necessary to meet that interest. 699 F.2d at 500-502.

SUMMARY OF ARGUMENT

Through its ban on wine advertising, Oklahoma attempts to control the activity of its citizens by restricting their access to non-misleading information about a lawful product. This Court, however, has consistently held unconstitutional regulations that suppress commercial speech solely because of official antagonism towards the message it conveys. Under the Constitution, the government cannot attempt to regulate the conduct of its citizens by preventing them from receiving information useful to informed decision-making. The advertising ban

should therefore be struck down as a content-based restriction on speech.

The Oklahoma prohibition is also invalid under the standards that this Court has applied to test the constitutionality of restrictions on commercial speech. The state's interest in temperance is not substantial, given its failure to prohibit directly the sale and consumption of alcoholic beverages. Moreover, the ban fails to advance directly the state's asserted interest. Nothing in the record supports the conclusion that advertising stimulates overall consumption of alcohol. In any event, advertisements for wine continue to reach Oklahoma residents in sufficient quantity to belie any argument that the ban has anything more than a remote effect upon consumption. Oklahoma's asserted interest could be more directly served by a variety of restrictions which would not infringe on constitutionally protected speech. In the absence of proof that alternative restrictions would be ineffective in reducing alcohol consumption, Oklahoma's sweeping imposition on speech cannot be upheld. Finally, the prohibition is plainly overbroad because it effectively prevents the broadcast of non-commercial as well as commercial speech. If enforced, cable broadcasters in Oklahoma will have no choice but to stop airing programs that contain wine advertisements.

Respondent's contention that the twenty-first amendment overrides the first amendment interests in this case is also without merit. The twenty-first amendment gives Oklahoma no power to regulate petitioners, who are outside of the chain of liquor distribution within the state. Petitioners' first amendment rights are therefore paramount in this case.

ARGUMENT

I. THE FIRST AND FOURTEENTH AMENDMENTS BAR OKLAHOMA FROM REGULATING PRIVATE CONDUCT BY IMPOSING A BLANKET BAN ON THE DISSEMINATION OF INFORMATION ABOUT A LAWFUL ACTIVITY.

Through its blanket ban on wine advertisements, Oklahoma concededly attempts to regulate the lawful activities of its citizens by limiting their access to information which is neither false nor misleading. Such regulation, which prohibits speech merely because it provides information about conduct toward which the state is antagonistic, strikes at the very heart of the first amendment.

This Court has repeatedly invalidated state regulations that attempt to restrict expression because of its content, its ideas, its message, or its subject matter. *See Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 537 (1980); *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972). These regulations are anathema to the first amendment which rests "on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public . . . ." *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

This Court's recent decisions in the commercial speech context affirm the traditional first amendment principle that the state may not suppress truthful speech concerning a lawful activity, as the state of Oklahoma seeks to do here, merely because of official animus towards the message it conveys.[8]

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[8] The special attributes of commercial speech allow regulations directed at false or misleading information that would not be permitted if aimed at other varieties of speech. *In re R.M.J.*, 455 U.S. 191, 202-203 (1982). This degree of regulation is allowed in order to insure an unimpaired flow of truthful and legitimate commercial information. *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Coun-*

Instead, the Court has integrated commercial speech into the traditional framework of first amendment protection by stressing the importance of providing consumers with the broadest possible information about lawful products as a basis for making private economic decisions. *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 764-765 (1976).[9]

This Court has often rejected the "highly paternalistic approach"[10] endorsed by the court below in sustaining the Oklahoma ban. *Bigelow v. Virginia*, 421 U.S. 809 (1975), overturned a statute barring the publication of advertisements for out-of-state abortion referral agencies, indicating that a state "may not, under the guise of exercising internal police powers, bar a citizen of another State from disseminating information about an activity that is legal in that State." *Id.* at 824-825. Similarly, in *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. at 773, this Court held unconstitutional a statute prohibiting pharmacists from engaging in price advertisements of prescription drugs and ruled that a state may not "completely suppress the dissemination of concededly truthful information about entirely lawful activity [simply because it is] fearful of that information." *See also Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 505 (1981). This Court used the same rationale in *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85 (1977), to invalidate a

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cil, Inc., 425 U.S. 748, 771 n.24 (1976). It has been suggested that commercial speech, because of its relationship to economic profit, is more robust than other types of speech and therefore less likely to be chilled by regulations designed to insure its truthfulness. *Id.*

9 Indeed, "in recent years this Court has not approved a blanket ban on commercial speech unless the expression itself was flawed in some way, either because it was deceptive or related to unlawful activity." *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. at 566 n.9.

10 *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. at 770.

municipal ordinance that forbade the posting of "For Sale" signs on residential property, despite the importance of Willingboro's asserted interests.

The Oklahoma prohibition is precisely the sort of restriction which this Court repudiated in each of these cases. The advertisements at issue here are neither false nor misleading. *Oklahoma Telecasters*, 699 F.2d at 500 and n.9. Nor is the prohibition aimed at unlawful activity; the state has not chosen to regulate directly the sale or consumption of alcohol by making them illegal. Instead, the state seeks to pursue its goal of reducing alcohol consumption by suppressing commercial information about liquor.

The first amendment, as applied by the fourteenth amendment, bars Oklahoma from controlling the behavior of its citizens by restricting their access to the information they need to make an informed choice about whether to engage in a lawful activity. Instead, it requires an alternative approach. "That alternative is to assume that this information is not in itself harmful, [and] that people will perceive their own best interests if only they are well enough informed[.] . . . [T]he best means to that end is to open the channels of communication rather than to close them." *Virginia Board of Pharmacy*, 425 U.S. at 770. For this reason, Oklahoma's "highly paternalistic" prohibition is unconstitutional.

II. THE OKLAHOMA BAN FAILS THE REQUIREMENTS OF THE FIRST AND FOURTEENTH AMENDMENTS THAT ANY REGULATION OF COMMERCIAL SPEECH BE DIRECTLY RELATED TO A SUBSTANTIAL GOVERNMENT INTEREST AND BE NO MORE EXTENSIVE THAN NECESSARY TO MEET THAT INTEREST.

In our judgment, this Court's decisions holding unconstitutional content-based prohibitions of nonmisleading speech about lawful activities, discussed in Part I, *supra*, require that the Oklahoma ban be struck down. Oklahoma has admitted that the purpose of this ban is to influence its residents'

decisions regarding a lawful activity. The prohibition is thus similar to those regulations struck down by this Court in *Bigelow v. Virginia*, 421 U.S. at 824-25, and *Linmark Associates, Inc. v. Willingboro*, 431 U.S. at 85, and should be governed by the same content-based analysis applied in those cases.

This Court has, however, in the context of pure commercial transactions, also applied a four part test to determine the constitutionality of regulations affecting commercial speech. *See Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. at 566. The Oklahoma prohibition fails this test as well. In *Central Hudson*, this Court articulated the strict standard to be applied in determining the constitutionality of restrictions on otherwise lawful commercial speech:

> "The State must assert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that interest. The limitation on expression must be designed carefully to achieve the State's goal. Compliance with this requirement may be measured by two criteria. First, the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive."

447 U.S. at 564.[11] The party seeking to restrict speech carries the burden of meeting this standard.[12] Special scrutiny is applied where, as here, the regulation suppresses commercial

11 *See Bolger v. Youngs Drug Products Corp.*, 103 S. Ct. 2875, 2881 (1983); *In re R.M.J.*, 455 U.S. at 203.

12 *Bolger v. Youngs Drug Products Corp.*, 103 S. Ct. at 2882 n.20; *Central Hudson*, 447 U.S. at 570; *Linmark Associates, Inc. v. Willingboro*, 431 U.S. at 95.

speech in order to pursue a nonspeech-related policy. *Id.* at 566 n.9.[13]

The court below significantly weakened this standard. It looked only to whether there was a "reasonable relationship" between Oklahoma's asserted interest in reducing the consumption of alcohol and the advertising ban on wine, rather than to whether the ban "directly advanced" a substantial state interest. *Oklahoma Telecasters*, 699 F.2d at 501. It also failed to consider whether less restrictive alternatives to the ban were available, *id.* at 501-02, and simply assumed that Oklahoma's interest in temperance is substantial.

A. Oklahoma's Interest in Temperance is Neither Substantial Nor Directly Advanced By Its Ban on Wine Advertisements.

Throughout this litigation, Oklahoma has contended that its ban on wine advertisements is intended to reduce the consumption of liquor. The twenty-first amendment[14] gives the states the power to regulate the sale of alcoholic beverages and to ban them altogether. Yet Oklahoma has chosen not to advance its interest by prohibiting the sale and consumption of alcoholic beverages.[15] Having made this decision, Oklahoma cannot now argue that reduction of alcohol consumption is so important that it overrides petitioners' first and fourteenth amendment interests. *See Central Hudson*, 447 U.S. at 564.

Moreover, whatever Oklahoma's interests in promoting temperance, its ban on wine advertising fails to advance directly

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13 *See* discussion in Part I, *supra*.

14 The twenty-first amendment provides, in relevant part:

> "The transportation or importation into any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

U.S. Const. amend. XXI, § 2.

15 *See* Oklahoma Alcoholic Beverage Control Act, Okla. Stat. Ann. tit. 37, §§ 505-74 (West Supp. 1982).

that interest. The Court below simply assumed that because advertising is believed to increase sales, Oklahoma's prohibition against wine advertising is "reasonably related to reducing the sale and consumption of those beverages and their attendant problems." *Oklahoma Telecasters*, 699 F.2d at 501. The court's application of a reasonable relationship test ignored the constitutional requirement that "[t]he limitation on expression must be designed carefully to achieve the State's goal." *Central Hudson*, 447 U.S. at 564. "[T]he regulation may not be sustained if it provides only ineffective or remote support for the government's purpose." *Id.* Any direct relationship between Oklahoma's asserted interest in temperance and the means of accomplishing that goal is purely speculative.

First, nothing in the record substantiates the court's assumption that liquor advertising stimulates overall consumption rather than simply increasing the individual advertiser's market share or brand loyalty. Second, banning advertisements in one medium cannot advance any governmental interest when the same information reaches Oklahoma residents through other media sources: radio broadcasts originating outside of the state transmit wine advertisements; newspapers and magazines published outside the state carry advertisements for wine and distilled spirits; and network television and cable operators have always broadcasted beer commercials. Given the amount of advertising already reaching Oklahoma residents, the state's ban on wine advertisements provides, at best, only "remote" and "ineffective" support for its goal of encouraging temperance. *See id.* at 564.

B. Oklahoma's Advertising Ban Is More Extensive Than Necessary To Fulfill Any Interest in Temperance.

Under the *Central Hudson* test, Oklahoma's ban on wine advertisements cannot survive if its interest in temperance could be served as well by a more limited restriction on commercial speech. *Central Hudson*, 447 U.S. at 564. The Court below erred in two respects in applying this prong of the *Central Hudson* test. First, it ignored the prohibition's broad

impact on cable operators and their audiences. If enforced, the advertising ban would require cable operators to delete entirely any program containing wine commercials.[16] The news and entertainment programs thus barred are precisely the type of speech given full first amendment protection.[17]

Second, the court below failed to consider any of the possible alternatives to Oklahoma's total ban. *Oklahoma Telecasters*, 699 F.2d at 502. Other methods of reducing alcohol consumption exist that would not restrict the first amendment rights of broadcasters and listeners. Oklahoma could disseminate information regarding the dangers of alcohol consumption; it could impose stricter age controls on who can drink alcoholic beverages, or when and where such beverages can be served; or it could simply ban the sale and consumption of alcohol within the state. None of these alternatives would restrict either commercial or non-commercial speech in any way. Each would more directly accomplish the goal of reducing alcohol consumption.

Yet Oklahoma has chosen none of these alternatives, nor has it offered any justification for its failure to do so. In the absence of a showing that any of these means would be ineffective in reducing the consumption of alcohol, Oklahoma's sweeping restriction on speech cannot be allowed to stand. *See In re R.M.J.*, 455 U.S. at 207; *Central Hudson*, 447 U.S. at 571.

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16 *See* note 6, *supra*.

17 *See Metromedia, Inc. v. City of San Diego*, 453 U.S. at 515; *Consolidated Edison Co. v. Public Service Comm.*, 447 U.S. at 537-8; *Police Dept. of Chicago v. Mosley*, 408 U.S. at 96.

III. THE TWENTY-FIRST AMENDMENT DOES NOT OVERRIDE THE PETITIONERS' FIRST AND FOURTEENTH AMENDMENT INTERESTS IN CARRYING ADVERTISEMENTS FOR WINE.

The court below upheld Oklahoma's ban on wine advertisements because it believed that states are owed increased deference when acting pursuant to the twenty-first amendment. *Oklahoma Telecasters*, 699 F.2d at 501.[18] In so holding, the court gave unprecedented weight and breadth to the twenty-first amendment. Its decision is simply inconsistent with this Court's prior decisions.

The twenty-first amendment, by its terms, gives states control over the "transportation or importation" of intoxicating liquor into their territories. *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 107 (1980). It gives states the power to prohibit the manufacture, transportation, sale and possession of liquor within their boundaries, *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138 (1939), and to regulate the times, places and circumstances under which liquor may be sold. *New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 715 (1981) (per curiam). Yet nothing in the twenty-first amendment gives states the power to regulate the speech of entities not involved in the transportation or importation of alcohol within a particular state. It has been construed to apply only to entities licensed to manufacture,

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18 The United States Court of Appeals for the Fifth Circuit likewise relied heavily upon the twenty-first amendment in upholding Mississippi's ban on liquor advertising which originated within the state. *See Dunagin v. City of Oxford*, No. 80-3762 (5th Cir., Oct. 31, 1983) (*en banc*). The court purported to apply the four-part *Central Hudson* test, but held that the presumption of validity under the twenty-first amendment "establish[es] the balance in favor of the state . . . ." *Dunagin*, *supra*, slip op. at Part III.C. Significantly, a majority of the *en banc* court disagreed with the "mischievous and insidious" extension of the twenty-first amendment. *Id.* (Williams, J. concurring); *id.* (Gee, J., dissenting and relying on the panel's orginal opinion at 701 F.2d 314).

distribute, transport or sell liquor. *See id.* at 716; *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 933 (1975).[19]

In this case, Oklahoma attempted to extend its power under the twenty-first amendment beyond the regulation of the sale of liquor and beyond entities engaged in its transportation or importation. Indeed, its prohibition affects national advertising with no direct relationship to the sale of alcohol within Oklahoma. No basis exists for such an extension of power either in the terms of the twenty-first amendment itself or in the decisions of this Court.[20]

Moreover, while the twenty-first amendment creates an exception to the normal operation of the commerce clause, *Craig v. Boren*, 429 U.S. 190, 206 (1976), it is of little relevance to other constitutional provisions. As this Court commented in *Craig v. Boren*, " 'Neither the text nor the history of the Twenty-First Amendment suggests that it qualifies individual rights protected by the Bill of Rights and the Fourteenth Amendment where the sale or use of liquor is concerned.' " *Id.*, quoting P. Brest, *Processes of Constitutional Decisionmaking, Cases and Materials* 258 (1975).

Thus, gender based discrimination in the legal drinking age denies equal protection despite the twenty-first amendment. *Craig v. Boren*, 429 U.S. at 210. Neither has the amendment been allowed to qualify the scope of due process rights.

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19 *Queensgate Investment Co. v. Liquor Control Comm.*, 103 S. Ct. 31 (1982), raised no substantial federal question because its advertising ban applied only to off premises, retail price per drink advertising by certain retail liquor permit holders, and was thus within the state's power under the twenty-first amendment. *See id.* at 69 Ohio St. 2d 361, 433 N.E. 2d 138.

20 As this Court has stated in interpreting the scope of the amendment, "[w]e should not . . . lose sight of [its] explicit grant of authority." *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. at 107. And this explicit grant of authority applies only to the "transportation or importation . . . for delivery or use." *Id.* at 106.

Wisconsin v. Constantineau, 400 U.S. 433, 436 (1971). And in *Larkin v. Grendel's Den, Inc.*, 103 S. Ct. 505 (1982), this Court observed that a state "may not exercise its power under the Twenty-First Amendment in a way which impinges upon the Establishment Clause of the First Amendment." *Id.* at 510 n. 5. The same thing may be said for the speech clause.

Those cases giving the states broad power under the twenty-first amendment to regulate expressive conduct have been limited to situations involving conduct within establishments licensed to sell liquor. *New York State Liquor Authority v. Bellanca*, 452 U.S. 714 (1981); *California v. LaRue*, 409 U.S. 109 (1972).[21] This case does not involve an establishment which sells liquor, nor conduct within such an establishment. It is therefore outside the scope of the twenty-first amendment. The court below erred in upholding Oklahoma's unprecedented extension of its power under the twenty-first amendment at the expense of petitioners' rights under the first and fourteenth amendments.

21 In *Bellanca*, this Court held that the State had the power, under the twenty-first amendment, to ban the sale of liquor on premises where topless dancing occurs. 452 U.S. at 717. In *California v. La Rue*, the facial constitutionality of a statute prohibiting acts of "gross sexuality" in establishments licensed by the State to serve liquor was upheld as within the State's power under the twenty-first amendment. 409 U.S. at 118.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the United States Court of Appeals for the Tenth Circuit and hold that the Oklahoma prohibition against wine advertisements is unconstitutional under the first and fourteenth amendments.

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No. 82-1795

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CAPITAL CITIES CABLE, INC.; COX CABLE OF OKLAHOMA CITY, INC.; MULTIMEDIA CABLEVISION, INC.; AND SAMMONS COMMUNICATIONS, INC.,

Petitioners,

v.

RICHARD A. CRISP, DIRECTOR, OKLAHOMA ALCOHOLIC BEVERAGE CONTROL BOARD,

Respondent.

On Writ of Certiorari to the United States Court of Appeals For the Tenth Circuit

BRIEF OF AMICI CURIAE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION AND MAGAZINE PUBLISHERS ASSOCIATION IN SUPPORT OF PETITIONERS

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BRIEF OF AMICI CURIAE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION AND MAGAZINE PUBLISHERS ASSOCIATION IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST

The American Newspaper Publishers Association and Magazine Publishers Association support the position of the petitioners in the above-captioned case.[1]

[1] Copies of written consent of the parties have been filed with the Clerk of the Court, as required by Rule 36 of the Court.

The American Newspaper Publishers Association ("ANPA") is a national trade association representing approximately 1,400 newspapers which constitute approximately 90 percent of the total daily and Sunday newspaper circulation, and a substantial portion of the weekly newspaper circulation, in the United States. Magazine Publishers Association ("MPA") is a national trade association representing approximately 200 publishing companies which publish more than 800 consumer oriented magazines.

The members of these organizations carry advertising that would be prohibited under the type of state laws here in question. They also rely on the inclusion of advertising in their publications to support their vital First Amendment functions of providing news and information to the public. Improper application of this Court's precedents regarding First Amendment protection of commercial speech therefore threatens the members' ability to disseminate both commercial and noncommercial information. Amici do not question the existence of a state interest in regulating the sale and consumption of alcoholic beverages under the Twenty-first Amendment. They do, however, challenge as unconstitutional Oklahoma's method of advancing that interest by the outright prohibition of advertising. They also challenge as unconstitutional the indirect enforcement of that ban through the media which do not manufacture or sell the products, or even originate the advertising, but only carry it as part of their publications and programming.

If the decision below is permitted to stand, it will encourage other states to seek advancement of local non-speech policies through similar prohibitions of speech, and similar enforcement against the media, ultimately interfering with the ability of these organizations to perform their vital First Amendment functions.

SUMMARY OF ARGUMENT

The Court of Appeals for the Tenth Circuit reversed a District Court order declaring unconstitutional Oklahoma's ban

of liquor ads on cable television. In reaching this result, the decision below distorted the principles and misapplied the tests developed by this Court to provide First Amendment protection for commercial speech.

More importantly, it failed to recognize the critical relationship, highlighted by this case, between the dissemination of commercial and noncommercial speech in the affected media. If the wine advertisements at issue here are banned, it is not only those commercial messages, but also the news, entertainment and other noncommercial programming which they accompany, that may not be received by Oklahoma residents. This is a result which cannot be supported by whatever interest the state may have in minimizing alcohol abuse.

However, it is not only the prohibition of advertising and its impact on other speech that is of grave concern to publishers. It is also the reasoning of the court below, which threatens to undermine this Court's efforts over the past 10 years to carefully refine and reinforce First Amendment protection for commercial speech. If the decision is allowed to stand, it will encourage other states to engage in far-reaching regulation of advertising involving not only alcoholic beverages, but other legal products and services as well, under the misconception that legislative presumptions will be upheld by the courts if only the interest of the state is "substantial" enough. The end result cannot help but be a reduction in the amount of information, both commercial and noncommercial, available to the public.

ARGUMENT

I. The Decision Below Distorts the Principles and Tests Protecting Commercial Speech.

In the past decade this Court has developed substantial protection for the very kind of commercial speech banned by the State of Oklahoma. *Compare Valentine v. Chrestensen*, 316 U.S. 52 (1942) *with Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). The Court "review[s] with special care regulations [such as this] that

entirely suppress commercial speech in order to pursue a nonspeech-related policy." *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. at 566, n. 9. And, as a result of this review, "in recent years, this Court has not approved a blanket ban on commercial speech unless the expression itself was flawed in some way, either because it was deceptive or related to unlawful activity." *Id.*

The fundamental principle may be summarized in this Court's language from *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 505 (1981):

> A State may not completely suppress the dissemination of truthful information about an entirely lawful activity merely because it is fearful of that information's effect upon its disseminators and its recipients.

The decision below violates this principle by approving a ban on truthful commercial speech concerning products lawfully sold in the State of Oklahoma. The decision is particularly disturbing because, in reaching its holding, the court distorted the test developed by this Court to guard against such a result. In *Central Hudson* this Court stated the following four-part test for the protection of commercial speech:

> (a) is the speech lawful and not misleading;
>
> (b) is the asserted governmental interest substantial;
>
> (c) does the regulation "directly advance the governmental interest asserted"; and
>
> (d) is the regulation "not more extensive than is necessary to serve that interest"?

447 U.S. at 566.

The Court in *In re R.M.J.*, 455 U.S. 191 (1982) recently noted the critical importance of the last two elements of this test and further refined them:

> [T]he State must assert a substantial interest and the interference with speech must be in proportion to the interests served. [Citation omitted.] Restrictions

> must be *narrowly drawn*, and the State lawfully may regulate *only to the extent* regulation furthers the State's substantial interest.

455 U.S. at 203 (emphasis added).

The decision below in effect disregards these last two elements of the *Central Hudson* test.

A. The Court Below Improperly Permitted the Twenty-first Amendment to Predetermine Its Analysis Under *Central Hudson*.

Under *Central Hudson*, a restriction on commercial speech cannot be upheld unless it is shown to "directly advance" the governmental interest asserted. 447 U.S. at 566. The court below considered it sufficient that the two were "reasonably related." Appendix A to Petition at 22a.

This disregard of the standard prescribed in *Central Hudson* reflects the Court of Appeals' heavy reliance on the Twenty-first Amendment to support its analysis and conclusions under the four-part test; this despite its pro forma acknowledgement that the Twenty-first Amendment should not unduly influence the analysis. *Compare* Appendix A to Petition at 17a *with* App. A at 23a-24a.

The Twenty-first Amendment does give states considerable power over the manufacture and sale of liquor, and permits strict regulation of the circumstances under which it may be sold. *See New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 715 (1981); *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138 (1939). However, the decisions of this Court construing that authority also recognize that the Twenty-first Amendment cannot be allowed to diminish the constitutional rights protected by the Bill of Rights and the Fourteenth Amendment, specifically including the First Amendment. *Larkin v. Grendel's Den, Inc.*, ____ U.S. ____, 103 S. Ct. 505, 510 n.5 (1982); *Craig v. Boren*, 429 U.S. 190, 206-207 (1976); *Wisconsin v. Constantineau*, 400 U.S. 433, 436 (1971).

The reasoning of these cases does not conflict with, but rather parallels, the approach of the *Central Hudson* test. The state's authority under the Twenty-first Amendment should be considered in determining (1) whether the speech is lawful and (2) whether the governmental interest asserted is substantial. These two elements of the test, after all, focus on the state's interest in regulating. The third and fourth elements, on the other hand, focus on First Amendment interests which limit the state's authority to regulate. They require distinct and separate inquiries into (3) whether the regulation directly advances the state interest and (4) whether the restriction is drawn as narrowly as possible. The balance between any governmental interest and the First Amendment is thus built into the test itself and can only be achieved by careful application of each distinct part of the test as a separate inquiry.

In the decision below, the Court of Appeals permitted the weight of the Twenty-first Amendment to influence its analysis and conclusion at each step of the way. On the issue of whether the regulation directly advances the state interest, the Court found:

> [*P*]*articularly in light of the additional deference owed to the legislature as a result of the Twenty-first Amendment*, . . . that prohibitions against the advertising of alcoholic beverages are reasonably related to reducing the sale and consumption of those beverages and their attendant problems.

Appendix A to Petition at 22a (emphasis added). On the fourth inquiry under *Central Hudson*—whether the regulation is no more extensive than necessary to serve the state's interest—the Court found:

> *With particular emphasis on the power of Oklahoma under the Twenty-first Amendment*, . . . that the advertising prohibitions here are no more extensive than is necessary to serve Oklahoma's asserted interest.

Appendix A to Petition at 24a (emphasis added). The end result is a confusion and serious misapplication of the Central Hudson test that results in no test at all, but instead a subjective ad hoc "balancing" with the scales irreversably weighted in favor of Twenty-first Amendment considerations. [2]

If the commercial speech doctrine painstakingly crafted by this Court is to to survive as a meaningful tool for analysis, the objectivity required by the *Central Hudson* test must be preserved. The existence of a constitutionally endorsed state interest should not excuse the State of Oklahoma or the Court of Appeals below from proper application of the test. If Oklahoma's ban against advertising does not, in fact, directly advance the state's interest, or if the ban does extend further than is necessary, then the First Amendment considerations inherent in these two elements of the test dictate that the restriction should fall, and the source of the state's interest should not change the result.

B. The Court Below Did Not Adequately Consider the Breadth of the Prohibition and Its Impact.

Under *Central Hudson*, a restriction on commercial speech must be no broader than necessary to serve the state interest. 447 U.S. at 564, 566; *In re R.M.J.*, 455 U.S. at 203. The court below engaged in no meaningful analysis of the breadth of the challenged prohibition, and it virtually ignored the need to consider less restrictive alternatives for advancing the state's interest. Appendix A to Petition at 23a-24a.[3] Instead, it simply

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[2] A similar approach was followed by the 5th Circuit in its recent decision *Dunagin v. City of Oxford, Mississippi*, 1983 F.2d Adv. Sh. 470 (October 31, 1983) *(en banc)*. The Court of Appeals in that case, while adhering more closely to the *Central Hudson* test than the court below, began its analysis by suggesting that the challenged ban on outdoor ads for alcoholic beverages enjoyed a "presumption in favor of validity" under the Twenty-first Amendment. *Id.* at 478.

[3] Other alternatives are available, for example: state-sponsored ads about the dangers of alcohol, or, as in *Central Hudson*, promoting conservative consumption; affirmative educational and remedial measures to combat the causes of the state's alcohol problem; or other measures, such as strict enforcement of drunk driving laws and laws against serving intoxicated individuals.

sanctioned the broadest and least constitutionally acceptable alternative, a total ban on this type of commercial expression by anyone other than a retailer within his store.

The court focused only on the fact that some alcoholic beverage advertising is allowed and that "[Appellees] are free to carry other forms of advertising," [4] and sidestepped the proper question of whether the prohibition, itself, goes further than necessary to advance the state's interest. On this question the court again simply deferred to the Twenty-first Amendment.

A more serious question under this part of the analysis is whether the prohibition reaches too broadly in terms of not only what, but also whom it restricts. Under the specific terms of the Twenty-first Amendment, the state might be able to argue that it has the power to regulate advertising as incidental to the manufacture, transportation, importation, and sale of alcoholic beverages. But the regulation here goes much further. The media against whom this prohibition is imposed are engaged in none of these activities. The media simply carry the advertisements, among many other commercial messages, as an integral part of their publications and programming. Through them, the State of Oklahoma seeks to enforce its policies against persons whose advertising activities are otherwise beyond the state's reach. [5]

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[4] Appendix A to Petition at 23a:

> Even though Appellees are completely prohibited from rebroadcasting alcoholic beverage advertising, they are free to carry other forms of advertising . . . On-premises advertising is allowed, the rebroadcast of beer advertising is not prohibited, and alcoholic beverage advertising in out-of-state printed publications distributed in Oklahoma is allowed.

None of these observations explains why a total prohibition of alcoholic beverage advertising on cable is necessary. In fact, the presence of beer advertising and unrestricted out-of-state print advertising may suggest the opposite conclusion.

[5] Use of the media to enforce state policy raises additional First Amendment concerns, as Mr. Justice Stewart observed in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, 403 (1973) (Stewart, J., dissenting).

In so doing, however, the state has had to face the practical reality that these efforts can reach only so far. Wine and liquor advertising carried in newspapers, magazines, and direct (i.e., non-cable) broadcasts, originating outside the state are all received by Oklahoma residents without restriction. Beer advertising has been and continues to be carried in all media in Oklahoma.[6]

From these facts, one might conclude that Oklahoma's prohibition of wine advertising carried by in-state media is not truly *necessary* to advance the state's interest, but done only as a matter of convenience. Is it "necessary" to ban out-of-state advertising carried by broadcasters and cable systems, where apparently it is not in the case of print media? Is it "necessary" to ban advertising for wine, but not for beer?

In the name of the Twenty-first Amendment, the Court of Appeals appeared willing to uphold a sweeping regulatory scheme that reaches to whatever practical limits of enforcement the state finds convenient. The court did not, however, address the question of whether a narrower restriction might serve the state's interests as well, or whether the arguable benefit of preventing advertising in certain media, while necessarily permitting the same advertising in other media, is sufficient to justify the serious restriction of First Amendment rights that results.

II. Enforcement of Oklahoma's Advertising Ban Against the Media Restricts Noncommercial Speech as Well.

A. Oklahoma's Advertising Ban Unconstitutionally Burdens Dissemination of Other Protected Speech.

In addition to being unnecessarily broad by its terms, this scheme of regulation is seriously overbroad in its effect. The

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[6] As noted more fully in the Brief of Amicus Curiae American Civil Liberties Union, the unrestricted presence of other alcoholic beverage advertising calls into question the court's conclusion that the prohibition of the same advertising on electronic media "directly advances" the state's interest. Given the amount of advertising of *all* types of liquor reaching Oklahoma's residents, the prohibition of wine advertising seems a rather *indirect* means of encouraging moderation.

declared intent of the State of Oklahoma is to prohibit only commercial speech, and, ostensibly, only commercial speech within Oklahoma.[7] The discussion thus far has focused on the unconstitutional method employed by the state in pursuit of that intent. However, a more serious and far-reaching defect results from the state's attempts to enforce its policy against the media carrying the prohibited advertisements as an integral part of other commercial and noncommercial programming. By imposing the advertising ban on local cable television systems, Oklahoma interferes with the dissemination of not only the particular commercial speech here in question, but also the full range of other programming—news, information, entertainment, and other commercial messages—which is transmitted with the wine advertising from sources outside the state.

The district court found, as an uncontroverted fact, that "[T]here exists no feasible way for Plaintiffs to block out the [wine] advertisements" carried as a part of broadcast signals distributed by the petitioner cable companies. Appendix G to Petition at 41a. The only way for the Oklahoma cable systems to comply with the law, therefore, would be to eliminate wine-sponsored programming in its entirety from those signals,[8] or to discontinue carriage of those broadcast signals altogether. Either of these steps would constitute an obvious state-compelled restraint on noncommercial speech, clearly impermissible under the First Amendment.

Oklahoma's advertising ban also interferes with the rights of its residents to receive, and the concomitant right of out-of-state programmers to disseminate, commercial and

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[7] That Oklahoma may not intend to suppress distribution of news and ideas also cannot save the restriction from unconstitutionality, for governmental acts which substantially burden the exercise of First Amendment rights cannot be justified by the mere fact that the intent may be proper or the result unintended. *See Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, ____ U.S. ____, 103 S. Ct. 1365 (1983); *Buckley v. Valeo*, 424 U.S. 1 (1976).

[8] Even if such excision of selected commercials were possible, it would pose additional problems under 47 CFR § 76.55(b), which requires that broadcast signals be carried in full, "without deletion or alteration of any portion," and under the Copyright Act, 17 U.S.C. § 111(c)(3).

noncommercial information intended to reach its audience as an integrated whole. The First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public . . ." *Associated Press v. United States,* 326 U.S. 1, 20 (1945), and the public has a "collective right to have the [broadcast] medium function consistently with the ends and purposes of the First Amendment." *Red Lion Broadcasting Co., Inc. v. FCC,* 395 U.S. 367, 390 (1969). To the extent the enforcement of one state's peculiar requirements interferes with the fulfillment of these goals, it imposes an unconstitutional burden on the dissemination of information under the First Amendment.

It is important to emphasize that the First Amendment interest at stake here is much more than the advertisers' right to distribute, and the public's right to receive, commercial speech concerning the virtues of a particular brand of wine. The prohibition imposed by the State of Oklahoma in this case affects dissemination of the entire range of programming—news, information, entertainment, and other commercial messages—which might accompany the prohibited advertising. Whatever arguments may be advanced in support of Oklahoma's regulation of commercial speech, it is clear that the state may not impose such burdens on the dissemination of other information protected by the First Amendment in the absence of the most compelling state interests. *See Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue,* ____ U.S. ____, 103 S. Ct. 1365 (1983); *Buckley v. Valeo,* 424 U.S. 1 (1976); *Murdock v. Pennsylvania,* 319 U.S. 105, 112-13, 116-17 (1943); *Grosjean v. American Press Co.,* 297 U.S. 233 (1936).

The Court is thus faced with two separate inquiries: First, can the total prohibition of commercial speech be justified under a proper application of Central Hudson; and second, regardless of the first answer, can the resulting burden imposed on dissemination of noncommercial speech be justified under the stricter standard? *See Metromedia, Inc. v. City of San Diego,*

453 U.S. at 512-13 (plurality opinion).[9] The court below did not even consider the latter question, but as the following discussion demonstrates, that too must be answered in the negative.

B. The Reasoning of the Court Below Threatens Dissemination of Other Advertising and Information by All Media.

It may be tempting to view this case as only a "Twenty-first Amendment case," [10] or only a "cable television case," and to assume that exceptions can be carved out that will not affect analysis of other state interests or other media. However, the uncomfortable fact is that the position adopted by the State of Oklahoma and the reasoning applied by the Tenth Circuit, if allowed to stand, create a pattern for future regulation of commercial speech and other members of the media that is not so easily confined.

As a matter of discretion, the Oklahoma Attorney General has not prosecuted Oklahoma distributors of out-of-state newspapers and magazines that include advertisements for alcoholic beverages. However, the presumptions and conclusions adopted by the Court of Appeals in upholding a ban on such

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[9] Although the plurality's distinction between commercial and non-commercial speech in *Metromedia* might be criticized, (*See, e.g.*, concurring opinion of Mr. Justice Brennan, 453 U.S. at 521-22), the instant case presents a situation in which a bifurcated analysis is clearly warranted. Unlike the ordinance in *Metromedia*, the Oklahoma ban, by its terms, prohibits only commercial speech. The effect on non-commercial speech is a direct consequence of that restriction, which must be subjected to the same scrutiny as any other non-speech related governmental action that impinges on First Amendment rights.

[10] The court's initial discussion of *Queensgate Investment Co. v. Liquor Control Commission*, 433 N.E.2d 138 (Ohio), *appeal dismissed*, 103 S. Ct. 31 (1982) seems to support such a limited interpretation. *See* Appendix A to Petition at 7a-9a, 13a-17a. However, the court also clearly acknowledges that "[t]he Twenty-first Amendment did not grant to the states the authority to abrogate individual rights guaranteed by the Fourteenth Amendment," Appendix A to Petition, at 17a, and proceeds to work through the *Central Hudson* test with passing references to the Twenty-first Amendment. The result is a rationalization of advertising prohibitions that could be applied in any case where a court believed "additional deference" was due to the decisions of a legislative or regulatory body.

advertisements included in out-of-state cable signals could apply in exactly the same way to prohibit such ads in imported newspapers and magazines. The nature of the speech is the same, the nature of the state interest is the same, and the lower court's misconstruction of the other elements of the *Central Hudson* test presumably also would be the same. Thus, out-of-state newspapers and magazines could be placed in the same extraordinary quandary as the cable companies by the decision below.

The newspapers and magazines now sent by mail and private carrier to homes, businesses, and newsstands in Oklahoma are fully integrated publications, edited to present the reader with a useful and complete package of news, opinion, and a wide range of other information, both noncommercial and commercial, in a manageable physical form. As a practical matter, distributors cannot be expected to excise liquor advertisements from the *Kansas City Star,* the *New York Times,* or *Time* magazine. Therefore, barring a portion of that advertising in Oklahoma would have the effect of barring these publications in their entirety. The state of Oklahoma apparently recognizes this fact.

However, if the validity of Oklahoma's enforcement efforts against the media is allowed to turn on the theoretical possibility of "blacking-out" portions of an electronic signal, whatever practical protection may now exist for these publications will dissolve when they become available to the reader as electronic impulses delivered over the air or through a cable. It is only a matter of time before these and similar publications are available on the television screen in the form of satellite-delivered, computer-retrieved electronic publications. Under the Court of Appeals' analysis, any and every state in the union could then claim the right to select and control the particular commercial messages its citizens will be permitted to receive within the state.

The Court need not venture into the future (however near it may be) to find a similar but less dramatic result. If Oklahoma's enforcement policy against out-of-state advertisers through its local media is upheld, what is to prevent other states from exercising similar controls, but in their own individualized

form? Issues relating to alcoholism treatment, drunk driving, and alcohol abuse in general have recently come to the fore as highly publicized and, inevitably, highly political issues. In most states, these concerns have resulted in the classic First Amendment response—i.e., more information and discussion on the subject, not less. However, if Oklahoma's ban on advertising is upheld, will the elected representatives in state legislatures around the country be able to resist the temptation to adopt their own particular restrictions on commercial speech in this area, in response to the political pressures beginning to emerge?

If not, members of the media will face a profusion of conflicting regulations, as predicted by this Court in striking down the prohibition of abortion advertising in *Bigelow v. Virginia*, 421 U.S. 809, 828-29 (1975):

> If application of this statute were upheld under these circumstances, Virginia might exert the power sought here over a wide variety of national publications or interstate newspapers carrying advertisements similar to the one that appeared in Bigelow's newspaper. . . . Other states might do the same. The burdens imposed on publications would impair, perhaps severely, their proper functioning. *See Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 257-258 (1974).

A much more serious question is thus suggested by the broad reasoning of the decision below—*i.e., can* its reasoning be confined to the facts at hand? Although the Court of Appeals appears to rely heavily on the Twenty-first Amendment to justify its departure from proper commercial speech analysis, it also finds support from loose and selective application of language from this Court's decision in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981). From these two sources, the court below was able to conclude that no more than a "reasonable relationship" between the regulation of commercial speech and advancement of a substantial state interest may be required; that substantial deference should be paid to the state legislature's findings regarding the need for regulation; and, most disturbing, that the *advertising* of a given product is

automatically related to the state's interest in addressing whatever problems may result from misuse of the product.

The danger in the decision below is the ease with which a total ban on any given class of advertising could be justified by the assertion of any substantial state interest. Under the Court of Appeals' misapplication of *Central Hudson* and *Metromedia*, all that is required is a reasonable relationship between the prohibition of advertising and the presumed reduction in sales of products that contribute to the perceived problems. The extreme reach of such reasoning is suggested by the court's own observation that "the entire economy of the industries that bring these challenges is based on the belief that advertising increases sales." Appendix A to Petition at 22a. From this it would follow that there always will be a "reasonable relationship" between any advertising sought to be banned and any social interests related to use or misuse of the products or services advertised. Such a construct does not depend on the presence of a Twenty-first Amendment interest, but could encourage the prohibition or severe restriction of advertising of any number of products and services.

It is a fact of economic life that advertising revenues have a direct effect on the ability of broadcasters and publishers to maintain news organizations and to provide high-quality information and editorial content.[11] If advertisers are forced to confront individual state-by-state restrictions on their commercial messages in the national and regional media, a significant source of financial support for news and editorial activities may well be lost. This close interdependence of commercial and noncommercial speech in our system of communication cannot be ignored in considering the impact of the type of blanket prohibition of advertising upheld by the Tenth Circuit in this case. As this Court noted in *Bigelow v. Virginia*, 421 U.S. 809, 828 (1975), such a ban when imposed on the media "incur[s] more serious First Amendment overtones" than do restrictions applied only to the advertiser.

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[11] *See Columbia Broadcasting Systems, Inc. v. Democratic National Committee*, 412 U.S. 94, 117 (1973); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 257 n.22 (1974).

CONCLUSION

The decision of the Court of Appeals, if allowed to stand, creates a dangerous precedent for suppressing commercial speech without analysis either of its alternatives or of its actual effects. The Court's failure to consider the impact of the Oklahoma law on programming and publications in which the advertising appears, particularly in the coming age of electronic information, opens the door to increasing and divergent regulation of the media. In short, the implications of the decision as it stands, like the effect of the regulation it upholds, reach far beyond the limited area of alcoholic beverage advertising on cable television to broadly threaten the access of each state's residents to the nationwide marketplace of ideas.

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October Term 1983

CAPITAL CITIES CABLE, INC., et al.,
Petitioners,

vs.

RICHARD A. CRISP, DIRECTOR, ALCOHOLIC BEVERAGE CONTROL BOARD,
Respondent.

BRIEF OF THE STATE OF MISSISSIPPI AMICUS CURIAE IN SUPPORT OF RESPONDENT

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BRIEF OF THE STATE OF MISSISSIPPI AMICUS CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS CURIAE

The State of Mississippi has adopted a statutory and regulatory scheme prohibiting certain advertisements of alcoholic beverages similar to, but not identical with, the provisions of the Constitution and laws of the State of Oklahoma under attack here. The pertinent provisions of Mississippi law are Sections 67-1-37(e), 67-1-85, and

97-31-1 of the Mississippi Code Annotated of 1972, as implemented by Regulation No. 6 of the Alcoholic Beverage Control Division of the Mississippi State Tax Commission.

Persons and corporations asserting a right to advertise liquor in Mississippi filed suits in the United States District Courts for the Northern and Southern Districts of Mississippi claiming that the Mississippi statutes unconstitutionally abridged plaintiffs' "commercial speech" rights to advertise liquor. The District Courts reached opposite conclusions. *Dunagin v. City of Oxford,* 489 F.Supp. 763 (N.D. Miss., 1980) (upholding); *Lamar Outdoor Advertising, Inc. v. Mississippi State Tax Commission,* 539 F. Supp. 817 (S.D. Miss., 1982) (invalidating). On consolidated appeals, a panel of the Court of Appeals for the Fifth Circuit rendered an opinion holding the Mississippi statutes and regulation to be unconstitutional. *Dunagin v. City of Oxford,* 701 F.2d 314 (5 Cir., 1983). However, on a rehearing *en banc,* the Fifth Circuit reversed the panel opinion, and held the Mississippi statutes and regulation to be constitutional. *Dunagin v. City of Oxford,* 718 F.2d 738 (5 Cir., Nos. 80-3762, 82-4076, October 31, 1983).

The State of Mississippi has a substantial interest in upholding the validity of its statutes, and, in furtherance of that interest, respectfully submits this Brief in support of the right of the State of Oklahoma to regulate and prohibit the advertisement of liquor and wine.

SUMMARY OF ARGUMENT

The police power of Oklahoma over the traffic in liquor, and all of its incidents, including advertising, augumented by the Twenty-First Amendment, outweighs any

attenuated First Amendment right to advertise liquor. The Twenty-First Amendment, and the police power underlying it, also impacts this case because the appropriate standard of review in cases of this type is the more deferential "rational relationship" test, not the typical "strict scrutiny" test applicable to many First Amendment cases.

If this Court should apply the four-prong test utilized by the Court in *Central Hudson Gas and Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), for the purpose of analyzing and deciding a "commercial speech" case, the Oklahoma prohibition of liquor advertising should be upheld. For purposes of this argument, the advertisement of liquor in Oklahoma is protected commercial speech. There is no dispute that the asserted governmental interest of Oklahoma in prohibiting the advertising of alcoholic beverages, so as to reduce the problems associated with alcohol abuse, is substantial. The third element of the *Central Hudson* test, which is whether the regulation directly advances the governmental interest asserted, is disputed by the parties, and is critical to a correct analysis of *Central Hudson*. It is Mississippi's position that the Oklahoma ban on liquor advertising does directly advance the State's unquestioned governmental interest. Prior decisions of this Court and common-sense reasoning make it manifest that the primary purpose and effect of advertising is to increase sales by stimulating consumption. The Oklahoma laws easily pass the fourth *Central Hudson* test, which is whether the regulation is more extensive than is necessary to serve the State's interest. Any regulation which resulted in a less than total prohibition of liquor advertising would render such regulation ineffective.

ARGUMENT

I.

THE POLICE POWER OF OKLAHOMA TO CONTROL LIQUOR, AUGMENTED BY THE TWENTY-FIRST AMENDMENT, IS AN ADEQUATE BASIS FOR UPHOLDING THE LAWS OF THAT STATE.

Mississippi requests the Court to focus on the nature of the product sought to be advertised in this "commercial speech" case. The product is intoxicating liquors. We believe that the nature of this product goes to the core of the question of whether those who wish to advertise it have a constitutionally-protected right to do so. Because of its harmful effects when abused, the states have always possessed unique, absolute police power to control liquor and all its incidents. The states have the judicially recognized police power to absolutely prohibit the whole business of liquor and the power to control it to any lesser degree that is not irrational.

We ask the Court to recognize that the State has enhanced police power over liquor due to liquor's harmful effects when used habitually. After factoring in liquor's harmful nature and the consequent enhanced authority to control its consumption and abuse to the point of prohibition, it is clear that the umbrella of "commercial speech", which is afforded only "a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values[1]," is not large enough to include protection for liquor advertising. An examination of the entire historical development of commercial speech reveals

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1. *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 456 (1978).

that this court's decisions granting commercial speech protection have always dealt with beneficial or constitutionally protected products and activities and have never legitimized the advertising of any chemically addictive products that are harmful beyond dispute such as liquor, over which the state has absolute control. *Central Hudson Gas and Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 570 (1980) (Promotional advertising by electric utility of electrical use; Court placed emphasis on finding that "appellants would advertise products and services that use energy efficiently."); *Bates v. State Bar Association*, 433 U.S. 350, 376 (1977) (Lawyer price advertising; Court pointed out that "restrained advertising would 'facilitate the process of intelligent selection of lawyers, and . . . assist in making legal services fully available.'"); *Carey v. Population Services International*, 431 U.S. 678, 701 (1977) (Contraceptive advertising; Court emphasized that such advertising was protected since it is "related to activity with which, at least in some respects, the State could not interfere."); *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 96 (1977) (Property "for sale" signs; Court stated that such signs "are of vital interest to Willingboro residents, since it may bear on one of the most important decisions they have to make: where to live and raise their families."); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 763, 764 (1976) (Prescription drug price advertisements; Court emphasized that "drug prices . . . could mean the alleviation of physical pain or the enjoyment of basic necessities" to the "poor, the sick, and particularly the aged."); *Bigelow v. Virginia*, 421 U.S. 809, 822 (1975) (Advertisements of legal abortion services in another state; Court pointed out that abortion ad "contained factual material of 'clear public interest'" and that the "activity advertised pertained to constitutional interests."

Just as the decisions granting commercial speech protection have emphasized the product or activity's benefit to the public, so the decisions that have denied First Amendment protection have emphasized the harmful nature of the activity. For example, in *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978), this Court expressly stated that "neither *Virginia Pharmacy* nor *Bates* purported to cast doubt" on the fact that the "state does not lose its power to regulate commercial activity being harmful to the public whenever speech is a component of the activity." *Id.* at 456. *Accord Friedman v. Rogers*, 440 U.S. 1, 10, n.9.

Most importantly, when the Supreme Court has had occasion to address the commercial speech right to advertise liquor, and the analogous products of cigarettes and narcotics, the Court has invariably denied First Amendment protection and given the issue short shrift. *Queensgate Investment Co. v. Liquor Control Commission*, 69 Ohio St. 2d 361, 433 N.E.2d 138, *appeal dismissed*, 74 L.Ed.2d 45 (1982), in which this Court summarily dismissed an appeal on the ground that a liquor price advertistising ban did not violate commercial speech rights of the advertiser, is authority for Oklahoma in this case. Furthermore, *Capital Broadcasting Co. v. Mitchell*, 333 F.Supp. 582 (D.D.C. 1971) (three judge court), *aff'd sub. nom. Capital Broadcasting Co. v. Acting Attorney General*, 405 U.S. 1000 (1972), and *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982), which upheld bans on advertising of cigarettes and drug paraphernalia, respectively, against commercial speech challenges, are also constitutionally indistinguishable from the instant case and further support the constitutionality of the Oklahoma laws.

It is significant that in cases decided within the context of a conflict between asserted "commercial speech"

rights and the power of the states to control the liquor traffic and all its incidents, this Court has upheld the State regulations based not only on the state's police power, but on the "added presumption in favor of the validity of the state regulation conferred by the Twenty-first Amendment." *New York State Liquor Authority v. Ballanca*, 452 U.S. 714, 718 (1981); and, *California v. LaRue*, 409 U.S. 109, 118 (1972).

Under *Ballanca*, *LaRue* and numerous other First Amendment—Twenty-first Amendment decisions, liquor laws are subjected to the minimum standard of constitutional review—the rational relation test. Under this relaxed, deferential analysis, the challenged statutes must be upheld "unless [they are] so unrelated to the achievement of any combination of legitimate purposes that [the court] can only conclude that the legislature's actions were *irrational*." *Vance v. Bradley*, 440 U.S. 93, 97 (1979) (emphasis added). *See California v. LaRue*, 409 U.S. 109, 118-19 (1972).

Clearly, under the rational relation test, "the state is not compelled to verify logical assumptions with statistical evidence" or with "current empirical proof". *Vance v. Bradley*, 440 U.S. 93, 110 (1979); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 812 (1976). As long as a relationship of the statutes to the asserted interest "is at least debatable," they are not unconstitutional. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981). This Court stated in *Minnesota v. Clover Leaf Creamery Co.*, *supra*:

> "States are not required to convince the courts of the correctness of their legislative judgments. Rather, those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably

be conceived to be true by the governmental decision-maker." *Id.*, page 464.

Applying this appropriate standard of review, the Oklahoma laws should be upheld against an attack based on asserted "commercial speech" rights.

It is basic that the plenary power of Oklahoma to regulate and control the liquor traffic includes and encompasses the power to regulate and control the incidents of the liquor traffic. This Court in its decision in *Ziffrin v. Reeves*, 308 U.S. 132 (1939), held that "the state may protect her people against evil incident to intoxicants . . . and may exercise large discretion as to means employed." *Id.*, pages 139-140.

In *Premier-Pabst Sales Co. v. State Board of Equalization*, 13 F.Supp. 90, 95-96 (S.D. Cal., 1935) (three-judge court), the Court explicitly held that advertising is one of the incidents to the sale of liquor which the State can prohibit and control.

II.

THE OKLAHOMA LAWS SHOULD BE UPHELD AS CONSTITUTIONAL IF THE CENTRAL HUDSON TEST IS APPLIED.

If this Court should decide not to uphold the Oklahoma laws on the bases presented in Argument I of this brief, Mississippi submits that, using appropriate criteria, the Oklahoma laws should still be held to be valid.

This Court, in *Central Hudson Gas and Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), articulated a four-part analysis to be used in deciding traditional "commercial speech" cases. The Court stated the test as follows:

> "In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." *Id.*, page 566.

For purposes of this argument, the advertisement of liquor in Oklahoma is protected commercial speech. There is no dispute that the asserted governmental interest of Oklahoma in prohibiting the advertising of alcoholic beverages, so as to reduce the problems associated with alcohol abuse, is substantial. The third element of the *Central Hudson* test, which is whether the regulation directly advances the governmental interest asserted, is disputed by the parties, and is critical to a correct analysis of *Central Hudson*. It is Mississippi's position that the Oklahoma ban on liquor advertising does directly advance the State's unquestioned governmental interest.

On the basis of common-sense reasoning, it is generally recognized that the purpose and effect of advertising is to increase sales by stimulating consumption. This Court in relevant "commercial speech" cases has taken cognizance of this well known fact. In *Central Hudson*, *supra*, this Court made the following finding:

> "There is an immediate connection between advertising and demand for electricity. Central Hudson would not contest the advertising ban unless it be-

lieved that promotion would increase its sales. Thus, we find a direct link between the state interest in conservation and the Commissioner's order." *Id.*, page 569.

Those who wish to advertise liquor attempt to evade this pertinent finding of the Court on the basis that the subject matter of the advertisement in *Central Hudson* was electricity, which is a monopoly. Such efforts are to no avail, because this Court sufficiently dealt with that contention in its *Central Hudson* opinion in the following language:

"Monopoly over the supply of a product provides no protection from competition with substitutes for that product. Electric utilities compete with suppliers of fuel oil and natural gas in several markets, such as those for home heating and industrial power. This Court noted the existence of inter-fuel competition 45 years ago, *see West Ohio Gas Co. v. Public Utilities Comm'n*, 294 U.S. 63, 72, 55 S.Ct. 316, 321, 79 L.Ed. 761 (1935). Each energy source continues to offer peculiar advantages and disadvantages that may influence consumer choice." *Id.*, page 567.

The opinion of this Court in the "commercial speech" case of *Metro Media, Inc. v. San Diego*, 453 U.S. 490 (1981), is also instructive. In that case, this Court stated:

"The more serious question, then, concerns the third of the Central Hudson criteria: Does the ordinance 'directly advance' governmental interests in traffic safety and in the appearance of the city? It is asserted that the record is inadequate to show any connection between billboards and traffic safety. The California Supreme Court noted the meager record on this point but held 'as a matter of law that an ordi-

nance which eliminates billboards designed to be viewed from streets and highways reasonably relates to traffic safety.' 26 Cal. 3d, at 859, 610 P.2d, at 412. Noting that '[b]illboards are intended to, and undoubtedly do, divert a driver's attention from the roadway', *ibid.*, and that whether the 'distracting effect contributes to traffic accidents invokes an issue of continuing controversy', *ibid.*, the California Supreme Court agreed with many other courts that a legislative judgment that billboards are traffic hazards is not manifestly unreasonable and should not be set aside. We likewise hesitate to disagree with the accumulated, common-sense judgments of local lawmakers and of the many reviewing courts that billboards are real and substantial hazards to traffic safety. There is nothing here to suggest that these judgments are unreasonable. As we said in a different context, *Railway Express Agency, Inc. v. New York, supra*, at 109, 93 L.Ed. 533, 69 S.Ct. 463:

> 'We would be trespassing on one of the most intensely local and specialized of all municipal problems if we held that this regulation had no relation to the traffic problem of New York City. It is the judgment of the local authorities that it does have such a relation. And nothing has been advanced which shows that to be palpably false.' "

Id., pages 508-509 (footnote omitted).

Based on the above case authorities and reasoning, Mississippi submits that the Oklahoma laws pass the critical third element of the *Central Hudson* test.

As to the fourth *Central Hudson* element, which is whether the regulation is not more extensive than is necessary to serve the governmental interest, it is plain that

the Oklahoma laws pass this test. We can do no better than to paraphrase the language used by this Court in *Metromedia, Inc. v. San Diego, supra,* 453 U.S., at page 508, in its analysis of the fourth part of the *Central Hudson* test. We would paraphrase the statement of the Court in *Metromedia, Inc. v. San Diego, supra,* as follows: If the state has a sufficient basis for believing that advertising liquor results in stimulating consumption of liquor, then, obviously, the most direct and perhaps the only effective approach to solving the problems such advertising creates is to prohibit it.

CONCLUSION

The State of Oklahoma, by referendum vote of its electorate, has made a decision to prohibit the advertisement of liquor and wine. *Amicus* respectfully submits that that solemn decision should not be invalidated by this Court.

Dated December 13th, 1983.

Respectfully submitted,

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No. 82-1795

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CAPITAL CITIES CABLE, INC., COX CABLE OF OKLAHOMA CITY, INC., MULTIMEDIA CABLEVISION, INC., AND SAMMONS COMMUNICATIONS, INC.,

Petitioners,

—v.—

RICHARD A. CRISP, DIRECTOR, OKLAHOMA ALCOHOLIC BEVERAGE CONTROL BOARD,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF *AMICI CURIAE* OF THE NATIONAL ASSOCIATION OF BROADCASTERS, AMERICAN BROADCASTING COMPANIES, INC., CBS INC., and NATIONAL BROADCASTING COMPANY, INC. IN SUPPORT OF REVERSAL

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BRIEF *AMICI CURIAE* OF THE NATIONAL ASSOCIATION OF BROADCASTERS, AMERICAN BROADCASTING COMPANIES, INC., CBS INC., and NATIONAL BROADCASTING COMPANY, INC.

This brief is respectfully submitted on behalf of the National Association of Broadcasters, American Broadcasting Companies, Inc., CBS Inc. and National Broadcasting Company, Inc. as *amici curiae*. Pursuant to Rule 36.2 of the rules of this Court, *amici* have obtained and filed the written consents of each of the parties to the filing of this brief. The *amici curiae* support the position of petitioners in this case and urge reversal

of the decision below. This brief, filed on their behalf, is devoted primarily to the issue of the constitutionality under the First Amendment of Oklahoma's wholesale prohibition on commercial advertisements for liquor products.

Interest of *Amici Curiae*

The National Association of Broadcasters ("NAB") is a nonprofit incorporated association of radio and television broadcast stations and broadcast networks. As of November 9, 1983, NAB membership included 4,387 radio stations, 700 television stations and all the major commercial broadcast networks. Among NAB's members are stations broadcasting within the State of Oklahoma, as well as out-of-state broadcasters whose programming is carried by the petitioner cable companies within the State of Oklahoma.

American Broadcasting Companies, Inc. ("ABC"), CBS Inc. ("CBS") and National Broadcasting Company, Inc. ("NBC") each operate national television and radio networks and are engaged, *inter alia*, in producing news and entertainment programming and disseminating it to the public through their owned and affiliated broadcast stations throughout the country. ABC, CBS and NBC each have affiliated broadcast stations in Oklahoma. Cable systems located within the State of Oklahoma carry the national and local programming of the in-state affiliates as well as the programming of certain network affiliates located outside the state. Unlike the services offered by petitioners, the broadcast programming supplied by each of the networks and their affiliates is provided free of cost to the public by the sale of commercial time to national and local advertisers. Each of the networks presents advertisements, through their affiliates, of a type prohibited by the Oklahoma statute.[1] Thus, each of the *amici* has a clear stake in the outcome of this litigation.

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1 Although the Oklahoma regulatory scheme applies to all alcoholic beverages containing more than 3.2 percent alcohol, each of the

More broadly, each of the *amici* has an interest in the serious First Amendment issues raised by Oklahoma's prohibition of an entire category of truthful advertising of products which are lawfully sold within the state. If the decision below is permitted to stand, it will eviscerate protections afforded by the Constitution designed to assure that states do not interfere with the free flow of information to the public.

This brief, *amici curiae*, is submitted in support of *amici*'s position that Oklahoma's regulatory scheme is plainly unconstitutional.

SUMMARY OF ARGUMENT

Oklahoma's sweeping prohibition on the broadcasting and other dissemination of liquor advertising is utterly inconsistent with the well-established and controlling principles set forth by this Court from its first recognition of First Amendment protection for commercial speech to its most recent. This brief first addresses the Tenth Circuit's misperception of this Court's summary dismissal in *Queensgate Investment Co.* v. *Liquor Control Commission*—a misperception which infects the Tenth Circuit's entire analysis of the issues raised here. The states' power to regulate the importation and transportation of liquor is next considered and the notion that the Twenty-first Amendment can be said to override the First Amendment principles that would otherwise be dispositive here is analyzed and rejected. This Court's commercial speech decisions are then reviewed. It is urged that the decision in *Bigelow* v. *Virginia*, which also dealt with a total prohibition on advertising, is dispositive of the issues presented and in and of itself mandates reversal of the court below.

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networks has chosen neither to accept nor broadcast advertisements for alcoholic beverages other than beer or wine. Because advertisements for beer generally do not specify alcoholic content, the advertising of beer has been permitted in Oklahoma. Petition ("Pet.") at 3a-4a.

ARGUMENT

The Decision of the Tenth Circuit is Inconsistent With Well-Established Protections Afforded by the First Amendment to Commercial Speech

1. The Summary-Dismissal Question

Throughout the course of its opinion, the Tenth Circuit placed enormous weight on the effect of this Court's summary dismissal of the appeal taken in *Queensgate Investment Co.* v. *Liquor Control Commission*, 69 Ohio St. 2d 361, 433 N.E.2d 138, *appeal dismissed*, 103 S. Ct. 31 (1982). Although the court below acknowledged this Court's warning to lower courts to avoid being "so preoccupied with a summary dismissal that they fail 'to undertake an independent examination of the merits' " (699 F.2d at 497; Pet. at 15a) (quoting *Mandel* v. *Bradley*, 432 U.S. 173, 177 (1977) (*per curiam*)), the pervasive influence of the Tenth Circuit's misapprehension of the effect of the summary dismissal in *Queensgate* is evident throughout the opinion. *See*, *e.g.*, 699 F.2d at 498, 499, 502; Pet. at 15a, 18a-19a, 24a.

While it has long been clear that summary dismissals are dispositions on the merits, *Hicks* v. *Miranda*, 422 U.S. 332, 344 (1975), they "are not of the same precedential value as would be an opinion of this Court treating the question on the merits." *Edelman* v. *Jordan*, 415 U.S. 651, 671 (1974).[2] Sum-

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2 "Indeed, upon fuller consideration of an issue under plenary review, the Court has not hesitated to discard a rule which a line of summary [dispositions] may appear to have established." *Fusari* v. *Steinberg*, 419 U.S. 379, 392 (1975) (Burger, C.J., concurring). *Illinois State Board of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 180-81 (1979) (summary dispositions "have considerably less precedential value than an opinion on the merits").

Inherently, a summary dismissal without opinion does not adequately discuss or explain the issues at hand. "[J]urisdictional statements . . . rarely contain more than brief discussions of the issues presented" and thus cannot serve as a basis for "a conclusive resolu-

mary dismissals have accordingly been narrowly interpreted to extend only to "the precise issues presented and necessarily decided," *Mandel* v. *Bradley, supra*, 432 U.S. at 176 and "no more may be read into [the Court's] action than was essential to sustain that judgment." *Illinois State Board of Elections* v. *Socialist Workers Party, supra*, 440 U.S. at 183. In failing to identify the precise and distinct issues raised in *Queensgate* and in extrapolating broad—and hitherto unsupported—constitutional doctrines from it, the Tenth Circuit failed to give effect to this Court's warnings about the careful and circumscribed use to be made of summary dispositions.

The regulatory scheme at issue in *Queensgate* was radically different from that before the Tenth Circuit in this action. For one thing, the Oklahoma statute is a blunderbuss ban on the advertising of alcoholic beverages barring, at pain of criminal sanctions, all broadcasters, cable companies and the like from any liquor advertising. The Ohio regulation at issue in *Queensgate* was narrowly directed to liquor licensees themselves and restricted the advertisement by them of certain specific price information alone. Ohio Admin. Code § 4301: 1-1-44(A). *See Queensgate Investment Co.* v. *Liquor Control Commission, supra*, 69 Ohio St.2d at 361 n.1, 433 N.E.2d at

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tion of an important constitutional question. . . ." *Colorado Springs Amusements, Ltd.* v. *Rizzo*, 428 U.S. 913, 916-17 (1976) (Brennan, J., dissenting from the denial of the petition for a writ of *certiorari*). Summary dispositions lack "any substantive discussion" of the issues, *Edelman* v. *Jordan, supra*, 415 U.S. at 670 (1974), and only affirm the judgment but not necessarily the reasoning of the lower court, *Washington* v. *Confederated Bands and Tribes*, 439 U.S. 463, 477 n.20 (1979) (summary disposition "does not, as we have continued to stress . . . necessarily reflect our agreement with the opinion of the court whose judgment is appealed. It is not at all unusual for the Court to find it appropriate to give full consideration to a question that has been the subject of previous summary acton"). Thus, this Court has often afforded plenary hearing to allow "full opportunity to consider the issue," *Tully* v. *Griffin, Inc.*, 429 U.S. 68, 75 (1976), "raised and decided" by a prior summary dismissal. *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 14 (1976).

139 n.1. Not only were the Ohio regulations directed to a completely different class of speakers, but the regulations at issue in *Queensgate* expressly recognized the right of manufacturers and distributors of alcoholic beverages to advertise their products in Ohio as well as the right of liquor licensees "to advertise in newspapers of general circulation, radio and television, on bill boards, calendars, in or on public conveyances and in regularly published magazines." *Id.* In *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490 (1981)—this Court's most recent pronouncement on the effect of summary dispositions—this Court emphasized that differences in the scope or application of state regulations necessarily alter the issues presented to the Court and preclude reliance on summary dispositions.

It is apparent that the differences between the Ohio and Oklahoma statutory schemes presented radically different issues. Yet the Tenth Circuit considered itself bound by *Queensgate* and went so far as to interpret this Court's summary disposition there as standing for the proposition that

> "[w]hen the Twenty-first Amendment is considered in addition to Oklahoma's substantial interest under its police power, the balance shifts in the state's favor, permitting regulation of commercial speech that might not otherwise be permissible. We believe that the Supreme Court's summary dismissal in *Queensgate* mandates this result." 699 F.2d at 502; Pet. at 24a.

As demonstrated above, the Tenth Circuit's conclusion that it was bound by the decision in *Queensgate* despite the fact that the Ohio and Oklahoma regulatory schemes are not comparable is in itself an error of serious proportions. For it then to have extrapolated from the *Queensgate* dismissal a constitutional principle broader than ever before articulated by this Court is utterly without basis and undermines its entire analysis. As will be seen, this Court's prior decisions on the relationship between the Twenty-first Amendment and other constitutional guarantees not only do not "mandate" the conclusion reached by the Tenth Circuit, but they do not in any way support it.

2. The Twenty-First Amendment Issue

The grant to the states in Section 2 of the Twenty-first Amendment of the power to control the "transportation or importation" of liquor into their territories "logically entails considerable regulatory power not strictly limited to importing and transporting alcohol[,]" but, as this Court has made clear, it is imperative not to "lose sight of the explicit grant of authority." *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 107 (1980). Focusing upon the "explicit grant of authority" contained in the Twenty-first Amendment, this Court has on numerous occasions refused to permit the Amendment to be used as a shield to sustain state liquor regulations which transgress other constitutional imperatives. When such regulations have contravened those constitutional guarantees made applicable to the states through the Fourteenth Amendment, this Court has not hesitated to strike them down.

In *Wisconsin* v. *Constantineau*, 400 U.S. 433 (1971), the Court held that the Twenty-first Amendment did not insulate against invalidation a state statute which violated the due process clause of the Fourteenth Amendment. Acknowledging that the power of the states to regulate liquor "was extremely broad even prior to the Twenty-first Amendment[,]" 400 U.S. at 436, the Court nevertheless concluded that, since the statute at issue contravened the due process clause, it could not stand. Similarly, in *Craig* v. *Boren*, 429 U.S. 190 (1976) the Court struck down an Oklahoma statute establishing different drinking ages for men and women, rejecting in unequivocal terms the notion that a state's reference to the Twenty-first Amendment somehow could justify regulations which otherwise would violate the Fourteenth Amendment:

> "Appellees argue, however, that [the sections of the Oklahoma statute at issue] enforce state policies concerning the sale and distribution of alcohol and by force of the Twenty-first Amendment should therefore be held to withstand the equal protection challenge. . . . Our view

> is, and we hold, that the Twenty-first Amendment does not save the invidious gender-based discrimination from invalidation as a denial of equal protection of the laws in violation of the Fourteenth Amendment." 429 U.S. at 204-05.

Less than a year ago, this Court held unconstitutional a Massachusetts statute which empowered churches and schools to veto applications for liquor licenses made by the owners of establishments located within 500 feet of such churches and schools. *Larkin* v. *Grendel's Den, Inc.*, 103 S. Ct. 505 (1982). Writing for the Court, Chief Justice Burger declared: "The State may not exercise its power under the 21st Amendment in a way which impinges upon the Establishment Clause of the First Amendment." *Id.* at 510 n.5.[3]

Thus, this Court has rejected the notion that states may circumvent constitutional guarantees or alter their force by invocation of the Twenty-first Amendment. This Court's decisions in *California* v. *LaRue*, 409 U.S. 109 (1972), and *New York State Liquor Authority* v. *Bellanca*, 452 U.S. 714 (1981) (*per curiam*) make clear that the Twenty-first Amendment in no way suggests that direct restrictions on speech such as those at issue here can escape the full rigors of the First Amendment. Each dealt with regulations which, although affecting incidentally certain forms of expression engaged in at state-licensed

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3 *See also California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, *supra*, 445 U.S. at 114 ("the Twenty-first Amendment provides no shelter for the violation of the Sherman Act caused by the State's wine pricing program"); *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972) (appellee was entitled to a decree enjoining the enforcement of a regulation promulgated by the Pennsylvania Liquor Control Board to the extent such regulation violated the equal protection clause of the Fourteenth Amendment); *Hornsby* v. *Allen*, 326 F.2d 605, 609 (5th Cir. 1964) (in characterizing as a violation of due process a municipality's arbitrary and capricious denial to appellant of a liquor license, the court declared that "states do not escape the operation of the 14th Amendment in dealing with intoxicating beverages by reason of the 21st Amendment").

liquor establishments, were designed to control the *dispensation* of liquor, rather than the exercise of freedom of expression.

LaRue and *Bellanca* upheld the constitutionality of state regulations that prohibited the performance in licensed liquor establishments of enumerated sexual acts and topless dancing. In *LaRue*, after acknowledging that it would be erroneous to assert that "the Twenty-first Amendment supersedes all other provisions of the United States Constitution in the area of liquor regulations[,]" 409 U.S. at 115, this Court emphasized that the regulation at issue applied only to state-licensed liquor establishments:

> "While we agree that at least some of the performances to which these regulations address themselves are within the limits of the constitutional protection of freedom of expression, the critical fact is that California has not forbidden these performances across the board. It has merely proscribed such performances in establishments that it licenses to sell liquor by the drink." 409 U.S. at 118.

Similarly, in *Bellanca*, this Court explained: "the State has not attempted to bar topless dancing in 'any public place': As in *LaRue*, the statute's prohibition applies only to establishments which are licensed by the State to serve liquor." 452 U.S. at 716. In the present case, by contrast, the Oklahoma constitutional and statutory provisions at issue are not aimed primarily at liquor dispensation. Instead, the Oklahoma laws prohibit liquor advertising by any medium of communication altogether.[4]

That the Twenty-first Amendment generally and this Court's decisions in *LaRue* and *Bellanca* specifically do not alter the

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4 Paradoxically, under Article 27, Section 5 of the Oklahoma Constitution, a state-licensed liquor establishment is the one place at which a single sign, bearing the words "Retail Alcoholic Liquor Store," may be erected. Thus, no prohibition is imposed in the one place where the Twenty-first Amendment grants the broadest regulatory power.

First Amendment protection otherwise to be accorded the commercial advertisements at issue here was most recently recognized by a majority of the Court of Appeals for the Fifth Circuit sitting *en banc* in *Dunagin* v. *City of Oxford* and *Lamar Outdoor Advertising Inc.* v. *Mississippi State Tax Commission* (Nos. 80-3762 and 82-4076) (5th Cir. October 31, 1983) (*en banc*). That case dealt with a similar state ban on liquor advertising.[5]

In his opinion concurring in the result, which established a majority for the rejection of the state's Twenty-first Amendment claims, Judge Williams wrote:

> "The purpose of the Twenty-first Amendment was to remove all constitutional inhibitions as to the state's power to control intoxicating liquors as against the power of the federal government, particularly but not exclusively in the domain of interstate and foreign commerce. It had nothing whatsoever to do with encroachment upon the individual liberties protected in the Constitution. The governments, state and federal, had exactly the same powers to control spirits after the passage of the Twenty-first Amendment as they had before, as against claims of individual liberty under free-speech, due process, and equal protection.
>
> "A conclusion that the Twenty-first Amendment justifies greater intrusions upon the constitutional liberties of individual citizens than would otherwise be the case is an insidious doctrine because it holds that the Constitution

5 While the *en banc* panel ultimately upheld Mississippi's prohibitions against liquor advertising on grounds that the statute did not infringe the protections afforded commercial speech under the Constitution, both the concurring and dissenting opinions (joined by judges comprising a majority of the court) explicitly rejected the state's argument that the Twenty-first Amendment altered in any way the proper constitutional analysis to be applied. *See* slip op. at 488 (Williams, J., concurring, joined by Tate, J.); slip op. at 489 (Gee, J., dissenting, joined by Goldberg, Politz, Randall, and Higginbotham, JJ.). For all of the reasons set forth in point three of this brief, we believe that the disposition on the merits of the commercial speech claim in *Dunagin* was erroneous.

> places liquor in a totally unique position different from even dangerous drugs and other vice-prone products or occupations." *Id.* at 488.

In his dissenting opinion for five members of the panel,[6] Judge Gee reviewed *Wisconsin* v. *Constantineau*, *supra*; *Craig* v. *Boren*, *supra*; and *Larkin* v. *Grendel's Den, Inc.*, *supra*, and concluded:

> "These cases establish that when state laws related to liquor regulation have come in direct conflict with constitutional guarantees that the Fourteenth Amendment requires the states to respect, the Supreme Court has reviewed the state laws according to the standards otherwise applicable to the constitutional guarantees. The Twenty-first Amendment did not change the standard of review. We believe that this principle should apply to the Constitution's guarantee of free speech as well as to its guarantees of equal protection and due process, and its prohibition of an establishment of religion. As we have explained, an exception to this principle, recognized in *LaRue* and *Bellanca*, was limited to liquor regulations that incidentally burden expression. Since that exception is not applicable to the Mississippi laws before us, we now turn to the application of customary commercial speech principles to the facts of this case." 701 F.2d at 330 (footnote omitted).

That is precisely what we believe this Court should do.

3. The Commercial Speech Issue

The Tenth Circuit's analysis of the commercial speech issue raised by this case simply misses the mark. The court ignored this Court's persuasive and, we believe, controlling opinion in

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6 Judge Gee's opinion had been written for the court in the companion case, *Lamar Outdoor Advertising, Inc.* v. *Mississippi State Tax Commission*, 701 F.2d 314 (5th Cir. 1983). He adopted it as the dissenting opinion in *Dunagin*.

Bigelow v. *Virginia*, 421 U.S. 809 (1975). The court failed to give any weight whatsoever to the fact that special scrutiny is appropriate here where Oklahoma's regulatory structure operates as a direct restraint on the media. The court failed even to give any deference to this Court's continuing caution against the wholesale prohibition of any category of truthful commercial speech. Rather, under the shadow of its erroneous view of the *Queensgate* summary dismissal and the Twenty-first Amendment, the Tenth Circuit woodenly—and erroneously—interpreted this Court's opinion in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980) to uphold the statutory ban at issue. In so doing, the court resurrected the same paternalistic view of commercial speech that has been rejected consistently by this Court.

It would have been well for the Tenth Circuit to begin at the beginning. Not only did this Court's decision in *Bigelow* v. *Virginia*, *supra*, establish that commercial speech is entitled to a significant degree of First Amendment protection, but it is dispositive of this case.

In *Bigelow*, the editor of a Virginia newspaper was convicted for publishing an advertisement announcing the availability and legality of abortions in New York. At the time, abortion remained illegal in Virginia as did the publication of information encouraging or prompting the procuring of an abortion. Recognizing that the state had an important interest in safeguarding the health of its citizens, this Court nonetheless rejected Virginia's attempt to control what its citizens could and could not hear about commercial activities which were lawful in another state notwithstanding the fact that the same activity was unlawful in Virginia.

The parallels between the present case and *Bigelow* are compelling evidence of the error of the Tenth Circuit's opinion below. Here, as in *Bigelow*, the statute at issue purported to impose a flat prohibition on advertising of activity upon which the state frowned. Here, as in *Bigelow*, the prohibition extended to advertising which was neither deceptive nor mislead-

ing. Here, as in *Bigelow*, the prohibition affected the media as well as the advertisers themselves. There is, of course, one important distinction between *Bigelow* and the present case: the advertisements prohibited by Virginia in *Bigelow* related to activity which was unlawful in Virginia. By contrast, Oklahoma has prohibited the advertising of alcoholic beverages notwithstanding the fact that it has not chosen to make the sale of such beverages illegal. Thus, if anything, the state interest at issue here is less strong than that at issue in *Bigelow*. Unless the principles which guided this Court's decision in *Bigelow* are no longer valid, *Bigelow* should mandate reversal of the decision below.

The decision of the Tenth Circuit provides little guidance in this regard; that court failed even to cite to or discuss this Court's opinion in *Bigelow*. Yet a review of this Court's decisions since *Bigelow*, up to and including its most recent pronouncement in *Bolger* v. *Youngs Drug Products Corp.*, 103 S. Ct. 2875 (1983) suggests no retreat from the principles first established by this Court in *Bigelow*. Indeed, that review confirms that this Court has never sanctioned a prohibition on the dissemination of truthful and non-deceptive commercial information concerning lawful activities.

This has been so despite the fact that the commercial messages brought before this Court have sought to advance interests of quite diverse natures (*compare Bigelow* v. *Virginia*, *supra*, *with Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, *supra*) and that their dissemination sometimes furthered, but also sometimes hindered, other important societal goals (*compare Bolger* v. *Youngs Drug Products Corp.*, *supra*, *with Linmark Associates, Inc.* v. *Township of Willingboro*, 431 U.S. 85 (1977)). Commercial speakers have been criticized before this Court for encouraging excessive energy consumption (*Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, *supra*); for implicitly encouraging segregation (*Linmark Associates, Inc.* v. *Township of Willingboro*); for uttering the offensive (*Carey* v. *Population Services International*, 431 U.S. 678 (1977)); and for simple

bad taste (*In re R.M.J.*, 455 U.S. 191 (1982)). Nonetheless this Court has consistently

> "rejected the 'highly paternalistic' view that government has complete power to suppress or regulate commercial speech. '[P]eople will perceive their own best interests if only they are well enough informed, and . . . the best means to that end is to open the channels of communication, rather than to close them. . . .'" *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, *supra*, 447 U.S. at 562 (quoting *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976)).

Apart from the fact that this Court has never sanctioned the wholesale prohibition of truthful commercial speech concerning lawful activities, there are two additional factors present here which should have cautioned the Tenth Circuit to apply special scrutiny to the instant case: Oklahoma's prohibition operates as a direct restraint against the media and its prohibition is all-encompassing.

That Oklahoma's regulatory scheme demands particularly close scrutiny due to its direct impact on the media was established in *Bigelow* itself:

> "The strength of appellant's interest was augmented by the fact that the statute was applied against him as publisher and editor of a newspaper, not against the advertiser or a referral agency or a practitioner. The prosecution thus incurred more serious First Amendment overtones.
>
> "If application of this statute were upheld under these circumstances, Virginia might exert the power sought here over a wide variety of national publications or interstate newspapers carrying advertisements similar to the one that appeared in Bigelow's newspaper or containing articles on the general subject matter to which the advertisement referred. Other States might do the same. The

> burdens thereby imposed on publications would impair, perhaps severely, their proper functioning. See *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 257-258 (1974). We know from experience that 'liberty of the press is in peril as soon as the government tries to compel what is to go into a newspaper.' 2 Z. Chafee, Government and Mass Communications 633 (1947). The policy of the First Amendment favors dissemination of information and opinion, and '[t]he guarantees of freedom of speech and press were not designed to prevent "the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential. . . ." 2 Cooley, Constitutional Limitations 886 (8th ed.).' *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130, 150 (1967) (opinion of Harlan, J.)." 421 U.S. at 828-29 (footnote omitted).

That this Court has viewed total prohibitions on the dissemination of truthful commercial speech warily (as it has in other First Amendment contexts)[7] has, as well, been a constant theme running throughout this Court's opinions:

> "We review with special care regulations that entirely suppress commercial speech in order to pursue a non-speech-related policy. In those circumstances, a ban on speech could screen from public view the underlying governmental policy. See *Virginia Pharmacy Board*, 425 U.S., at 780, n.8 (Stewart, J., concurring). Indeed, in recent years this Court has not approved a blanket ban on commercial speech unless the expression itself was flawed in some way, either because it was deceptive or related to

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7 *See, e.g., Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50, 71 n.5 (1976) (Stevens, J., plurality opinion); *id.* at 81, n.4 (Powell, J., concurring). *See also Talley* v. *California*, 362 U.S. 60 (1960); *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940); *Lovell* v. *City of Griffin*, 303 U.S. 444 (1938); *Schneider* v. *State*, 308 U.S. 147 (1939); *Saia* v. *New York*, 334 U.S. 558 (1948).

unlawful activity." *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, *supra*, 447 U.S. at 566 n.9.

See also In re R.M.J., *supra*, 455 U.S. at 206-07.

As it failed to consider the import of this Court's opinion in *Bigelow* v. *Virginia*, *supra*, so the Tenth Circuit ignored these considerations as well. Rather, relying on its reading of this Court's decision in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, *supra*, the court upheld Oklahoma's broad regulatory scheme based on the view that it directly advanced the substantial governmental interest of reducing the sale and consumption of alcoholic beverages and that it was no more extensive than necessary to serve that interest.

It may, of course, always be said that flat prohibitions on speech about particular products may, or at least could, advance the interest of deterring use of the products. *Cf. Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, *supra*, 447 U.S. at 570; *Bolger* v. *Youngs Drug Products Corp.*, *supra*, 103 S. Ct. at 2883-84. As a factual matter, however, and as detailed in petitioner's submission to this Court (Pet. at 16) as well as in the district court's findings (Pet. at 42a), there is *nothing* in the record in this case to suggest that that is so.[8] Since it remains the case that the "party seeking to uphold a restriction on commercial speech carries the burden of justifying it," *Bolger* v. *Youngs Drug Products*

8 *Compare* Smart and Cutler, *The Alcohol Advertising Ban in British Columbia: Problems and Effects on Beverage Consumption*, 71 The British Journal of Addiction at 20 (1976) (empirical research yielded "little support for the view that the B.C. [British Columbian] advertising ban reduced alcohol consumption"); Ogbourne and Smart, *Will Restrictions on Alcohol Advertising Reduce Alcohol Consumption?*, 75 The British Journal of Addiction at 295 (1980) (it "seems unlikely that restrictions on advertising will reduce per capita consumption . . ."); van Iwaarden, *Advertising, Alcohol Consumption and Policy Alternatives*, Economics and Alcohol at 236 (1983) ("a ban on commercials will not have any direct impact on the overall use of alcohol[;] [e]ven in the long run the effects probably would be hardly substantial").

Corp., *supra*, 103 S. Ct. at 2882 n.20, there is no basis for sustaining the constitutionality of the Oklahoma law.

As for the question whether Oklahoma's prohibition is more extensive than is necessary to serve the state's interest, the Tenth Circuit's reasoning is less than clear. Essentially, the Tenth Circuit held that, because cable operators in Oklahoma could carry advertisements for products other than alcohol and because out-of-state speakers could disseminate advertising about alcoholic beverages to residents of Oklahoma, Oklahoma's scheme was not more extensive than necessary:

> "Even though Appellees are completely prohibited from rebroadcasting alcoholic beverage advertising, they are free to carry other forms of advertising. We recognize that the cable operators especially are placed in a difficult position; however, nothing in the First Amendment prohibits this result. *See Metromedia*, *supra*. On-premises advertising is allowed, the rebroadcast of beer advertising is not prohibited, and alcoholic beverage advertising in out-of-state publications distributed in Oklahoma is allowed. Although Appellees bear a disproportionate burden of the regulation, Oklahoma has not eliminated the dissemination of information concerning alcoholic beverages." 699 F.2d at 502; Pet. at 24a.

This analysis turns the commercial-speech tests inside out. That cable operators (or broadcast stations) are not prohibited from carrying advertisements for other products simply begs the question whether Oklahoma's ban on the advertising of alcohol is more extensive than is necessary to support its state interest. This Court has certainly never found a prohibition on commercial speech to be no more extensive than necessary on the ground that the speaker nonetheless remained free to speak about other things. That other speakers (including liquor store owners and out-of-state publishers) could reach residents of Oklahoma with advertisements relating to alcohol is likewise no answer.[9] Even ignoring the fact that this suggestion high-

9 That out-of-state publishers could legally reach Oklahoma residents was not explicitly contemplated by Oklahoma's laws; rather, this has

lights the substantial problems raised under the equal protection clause by Oklahoma's regulatory scheme, this Court has recently reemphasized that " 'one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.' " *Bolger* v. *Youngs Drug Products Corp.*, *supra*, 103 S. Ct. at 2882 n.18 (quoting *Schneider* v. *State*, 308 U.S. 147, 163 (1939)) (rejecting the government's argument that the challenged restriction did not significantly interfere with free speech on the ground that other channels of communication were not barred).

Unlike the district court, the Tenth Circuit declined even to explore whether less extensive regulation could have served the state's interest.[10] This is so despite the fact that the Ohio scheme at issue in *Queensgate*—a decision with which the court was familiar—provided one such example.[11]

The decision of the Tenth Circuit is one which simply overlooks the fundamental principles established throughout the years in this Court's opinions on commercial speech. It clings to a narrow and wooden reading of the guidelines set forth in *Central Hudson*. In so doing it ignored the fact that this Court has made clear that that case articulates but general

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been the interpretation subsequently given it. *See* 699 F.2d at 493, n.1; Pet. at 5a, n.1. The fact that out-of-state speakers are not silenced in Oklahoma also suggests the ineffectiveness of Oklahoma's efforts to advance its interests. In other words, since Oklahoma has decided that total suppression of speakers within the state is necessary to advance its interests, how can it be permitted to rely on the presence of other speakers to support its scheme?

10 This factor was critical in both of this Court's most recent decisions striking down prohibitions on speech about a particular product notwithstanding that those prohibitions served equally laudable goals. *Central Hudson*, *supra*; *Bolger* v. *Youngs Drug Products Corp.*, *supra*.

11 The regulations promulgated by Ohio employ means short of the wholesale prohibition imposed by Oklahoma. As discussed at pp. 5-6, *supra*, for example, they expressly permit manufacturers and distributors of alcoholic beverages to advertise their products. *See* Ohio Admin. Code § 4301:1-1-44.

guidelines derived from earlier opinions (*see In re R.M.J.*, *supra*, 455 U.S. at 204 n.16) and that these opinions in the richness of their factual detail provide guidance of which the Tenth Circuit never availed itself. Relying upon its interpretation of such general guidelines wrenched from the factual posture in which they arose, the court below wholly ignored the *Bigelow* decision. Instead, the court sanctioned a wholesale prohibition on truthful and nonmisleading commercial speech about lawful products. This result is unprecedented in decisions of this Court.

In the end, this case raises the question of the continued validity of the core proposition set forth in *Bigelow* and reaffirmed in later rulings of this Court: The "best means" for people to "perceive their own best interests" is "to open the channels of communication rather than to close them."

CONCLUSION

The decision of the Court of Appeals should be reversed.

Dated: November 17, 1983

Respectfully submitted,

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No. 82-1795

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CAPITAL CITIES CABLE, INC.; COX CABLE OF OKLAHOMA CITY, INC.; MULTIMEDIA CABLEVISION, INC.; AND SAMMONS COMMUNICATIONS, INC.,
Petitioners,

v.

RICHARD A. CRISP, DIRECTOR, OKLAHOMA ALCOHOLIC BEVERAGE CONTROL BOARD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF AMICUS CURIAE OF NATIONAL CABLE TELEVISION ASSOCIATION, INC., OKLAHOMA CABLE TELEVISION ASSOCIATION, AMERICAN TELEVISION AND COMMUNICATIONS CORP., VIACOM INTERNATIONAL, INC., AND ENTERTAINMENT AND SPORTS PROGRAMMING NETWORK, INC. IN SUPPORT OF PETITIONERS

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IN THE

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The National Cable Television Association, Inc. ("NCTA"), the Oklahoma Cable Television Association ("OCTA"), American Television and Communications Corp. ("ATC"), Viacom International, Inc. ("Viacom"), and Entertainment and Sports Programming Network, Inc. ("ESPN") respectfully submit this brief *amicus curiae* in support of Petitioners.

INTEREST OF AMICI CURIAE

NCTA is the principal trade association representing cable television operators in the United States. NCTA's members operate more than 2,000 cable systems nationwide. OCTA is an association of cable operators in Oklahoma representing more than 140 systems with over 400,000 subscribers. ATC, a wholly-owned subsidiary of Time, Inc., owns and operates 124 cable television systems in 33 states. Viacom is a diversified communications and entertainment company. Among other activities, Viacom owns 42 cable television systems in the United States and operates an advertiser-supported satellite cable network. ESPN is an advertiser-supported program service that provides sports programming and a daily business news program by satellite to over 28 million subscribers throughout the United States. ESPN serves 194 cable systems and other affiliates in Oklahoma. It regularly carries wine commercials.

Cable operators and advertiser-supported program services have a direct and substantial interest in this case. The court below has held that Oklahoma may prohibit cable operators from transmitting commercials for alcoholic beverages (including wine) on any of its channels. The result of such a prohibition is to limit drastically the sources of news and entertainment programming available to Oklahoma cable operators for retransmission to subscribers on their multichannel cable systems.

Microwave and satellite technology now makes it possible for cable systems to offer their subscribers not only improved reception of local over-the-air broadcast signals, but also distant, out-of-state broadcast signals and national cable networks. Many of these program sources contain advertising, including wine commercials. Because it is practically impossible for a cable operator to delete specific commercials from the numerous program services carried by his system (and because deletion of commercials from distant broadcast signals would be unlawful and result in copyright liability), the effect of the Okla-

homa statute is to prevent Oklahoma cable systems from transmitting any distant broadcast signals and cable networks that may include wine commercials.

The law thus severely restricts the cable operator's discretion in selecting programming and prevents subscribers from receiving any of the wide range of advertiser-supported program services that emanate from outside Oklahoma and would otherwise be available. The impact on advertiser-supported cable services is also severe. In seeking to survive in competition with national broadcast networks and other programming sources, these cable services generally depend upon a national audience of the largest possible size. If a state can effectively prevent a cable program service from reaching its residents, the result is not only to deny the service to cable operators and subscribers within that state but also to threaten the viability of the service nationwide.

For these reasons, NCTA, OCTA, ATC, Viacom, and ESPN submit this brief *amicus curiae* and urge the Court to reverse the decision of the court of appeals.

SUMMARY OF ARGUMENT

This case raises the question whether a state may prohibit cable television systems from carrying truthful advertisements for alcoholic beverages that may lawfully be sold in the state. The court of appeals characterized the case as one involving a restraint on "commercial speech" and held that, under the standards set forth by this Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), the restraint was permissible.

This Court has repeatedly held, however, that the First Amendment does not permit a state to attempt to suppress consumption of a product by completely prohibiting the lawful advertising of that product. The court of appeals ignored those holdings in applying the *Central Hudson* standards, even though those standards were intended to

summarize and synthesize—and not to overrule—this Court's decisions regarding commercial speech. The mere fact that the products at issue are alcoholic beverages does not justify a prohibition on the truthful advertising of such products. The Twenty-first Amendment empowers states to ban the sale of alcoholic beverages if they desire to suppress consumption of such beverages. It does not, however, authorize states to suppress the flow of information about lawful alcoholic beverages in order to promote an asserted interest in discouraging consumption. This Court's decision in *Queensgate Investment Co. v. Liquor Control Commission*, 103 S. Ct. 31 (1982), does not, as the court of appeals held, mandate a contrary conclusion. That case simply reaffirmed the right of states to impose restrictions on *licensed sellers* of alcoholic beverages; it did not uphold a complete prohibition on all advertising of such beverages.

In any event, the court of appeals, by focusing on commercial speech, completely ignored the most serious First Amendment restraints imposed by the Oklahoma statute. When applied to cable systems, the statute suppresses much more than mere commercial speech. It is practically impossible and, in some cases, unlawful for cable operators to delete commercials from the broadcast and nonbroadcast program services that they carry on their systems. Therefore, the only way to comply with the Oklahoma statute is to stop carrying any of the multitude of distant broadcast signals and advertiser-supported satellite cable services that may contain wine commercials. Thus, the statute severely restricts the selection of news and entertainment services available to cable systems and to their subscribers and effectively blocks national and out-of-state advertiser-supported program services that choose to carry wine commercials from reaching Oklahoma residents. Why, apart from the standards that may apply to the suppression of commercial speech, no regulatory interest permits a state to impose such a restraint on noncommercial ideas and information.

Finally, the Oklahoma statute is inconsistent with and preempted by federal law. In general, the Federal Communications Commission has clearly sought to occupy the area of signal carriage regulation to the exclusion of state and local governments, and has adopted a policy of encouraging unrestricted carriage of distant broadcast signals and nonbroadcast satellite services by cable systems. A state law that effectively prevents or prohibits cable systems from carrying particular broadcast or nonbroadcast signals is therefore preempted. Moreover, FCC rules require cable operators to carry local and nearby broadcast signals, some of which may originate from neighboring states. The FCC prohibits deletions of commercials from these signals, but the Oklahoma statute prohibits the carriage of wine commercials. To the extent that compliance with the Oklahoma statute would violate these FCC rules, the Supremacy Clause effectively nullifies the state law.

ARGUMENT

Introduction

On one level—the level on which the court of appeals analyzed it—this case raises the straightforward question of the extent to which a state may prohibit the truthful advertising of alcoholic beverages where the sale of such beverages is wholly lawful. Although this Court for many years adhered to the view that "commercial speech" was not generally entitled to First Amendment protection, the Court has in recent years completely rejected this position. Consistently, the Court has held that the First Amendment does not permit states to bar the truthful advertising of a lawful product. The decision of the court below upholding Oklahoma's prohibition on the advertising of wine and liquor is flatly inconsistent with these holdings.

The impact of the Oklahoma statute[1] on protected speech, however, became even more severe when, in May

[1] Oklahoma Alcoholic Beverage Control Act, 37 Okla. St. Ann. sec. 516 (1982). *See also* Okla. Const. art. 27, sec. 5.

1980, the state's Attorney General reversed past policy and ruled that the statute prohibits cable systems in Oklahoma from carrying advertisements for alcoholic beverages on any of the signals that they transmit to their subscribers. As so interpreted, the statute inhibits more than the dissemination of information and advertising regarding alcoholic beverages. Its effect is now to prevent Oklahoma cable operators from retransmitting—and Oklahoma residents from receiving—any out-of-state broadcast signals and national, satellite-delivered program services that may happen to carry advertisements for alcoholic beverages.

The signals transmitted by cable systems to their subscribers are generally obtained from several sources. One source is local and nearby broadcast signals, which are received over-the-air, using a tall master antenna. In its earliest days, cable television's principal function was to provide clear reception of nearby signals in rural areas where over-the-air reception was poor. Microwave relay systems subsequently made possible the retransmission of broadcast signals from more distant locations.

With the advent of satellite technology, cable operators can now also choose from among a large number of broadcast and nonbroadcast program services that are transmitted specifically for cable systems by satellite. The FCC has noted that "[a]s a result of satellite technology, cable systems and their subscribers have access to an extremely rich and divergent mix of program and information services."[2] From among all these available

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[2] *Amendment of Part 76, Subpart G of the Commission's Rules and Regulations Concerning the Fairness Doctrine and Political Cablecasting Requirements for Cable Television Systems* (MM Docket No. 83-331), Notice of Proposed Rulemaking, FCC 83-130, ¶ 25 (May 25, 1983).

For example, there are already 24-hour news services, ethnic, youth and adult-oriented program channels. There are in operation or under development, religious program channels,

broadcast and nonbroadcast program sources and his own locally produced programming, the cable operator fills his channels with the programming that in his judgment will best meet the needs and demands of his community.

Most television broadcast stations are advertiser-supported. In addition, while some cable services, such as premium movie channels, are supported completely by fees charged to the cable system and its subscribers, many satellite-delivered cable services contain commercial advertising.[3] These broadcast and satellite-delivered nonbroadcast sources may and often do contain wine advertisements. Oklahoma's statute, as upheld by the court of appeals, prohibits cable operators in the state from carrying any of these program sources on their systems unless they delete all such advertisements.

But deletion of particular advertisements from various program services is, in most circumstances, impossible and, in the case of commercials carried by broadcast stations, is unlawful. As the evidence in this case indicated, cable systems are not designed to enable the monitoring and deletion of commercials. In part, this is because cable operators have no way of knowing when the numerous advertiser-supported program services that they retransmit will carry a wine commercial. Thus, cable operators would have to monitor all channels simultaneously on a 24-hour-a-day basis and, upon identifying a wine commercial, try instantaneously to delete it. The

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political affairs channel, all weather, all sports, health channels, channels of foreign language programming, of cultural programming, women's programming, and regionally oriented satellite networks. In addition, many new program or information services are in the developmental stage and will be added to the existing list of cable satellite networks that now provide diversified information and programming to the public.

Id.

[3] Currently, there are 41 operating satellite-delivered services, of which 19 are advertiser-supported. NCTA Satellite Services List (Nov. 1983).

receipt and retransmission of cable services is generally automated and does not require constant monitoring. Even if it were possible to recognize and instantly delete each wine commercial, the cost of hiring personnel to perform this function would be prohibitive.[4] Thus, as the district court found, "[t]here exists no feasible way for [cable systems] to block out the advertisements."[5]

With respect to the deletion of wine advertisements from out-of-state broadcast signals, the problem is not merely one of infeasibility. The FCC flatly prohibits cable operators from deleting advertisements from the broadcast signals that they carry. *See* 47 C.F.R. § 76.55(b) (1982). In addition, under the Copyright Act of 1976, a cable operator who deletes commercials from broadcast signals forfeits his statutory license to carry those signals and is liable for copyright infringement. *See* 17 U.S.C. § 111(c)(3) (Supp. V 1981).

Therefore, the effects of Oklahoma's prohibition on the retransmission of wine commercials is to prohibit cable systems from carrying any of the multitude of available advertiser-supported program services that may carry wine commercials. The law ensures that Oklahoma cable

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[4] *See, e.g.*, II R. 36-41, 45-46, 54-57. Moreover, even if program services gave cable operators advance notice of when wine commercials would appear, it would still be necessary to effect deletions manually. While currently available automated equipment is capable of deleting entire programs on a particular channel, this equipment cannot be timed so precisely as to enable deletion of 10-, 30- or 60-second spot commercials. In any event, while nonbroadcast satellite cable services could conceivably be persuaded to make available such information to cable affiliates, there is no way to find out when a distant broadcast signal will carry wine commercials. Cable systems have no relationship at all with broadcasters whose signals are received off-the-air for retransmission to cable subscribers.

[5] Appendix to Petition for Certiorari ("Pet. App.") at 41a. The court of appeals did not dispute this finding and specifically recognized that, because of the statute, "cable operators especially are placed in a difficult position." Pet. App. at 23a.

subscribers will not see liquor and wine commercials; it also ensures that they will not see any of the news, sports and entertainment programming carried by out-of-state broadcast stations (including the satellite-delivered "superstations"), by ESPN, by the Cable News Network, or by any of the other advertiser-supported program services that may occasionally carry such commercials.

Furthermore, by restricting a cable operator's ability to provide what he perceives to be the most desirable program services, the statute could undermine the viability of cable service altogether in some Oklahoma communities. Cable television is a highly capital-intensive business. A cable operator's decision to wire an entire community and equip his facilities is premised on his ability to provide a multi-channel package of program services that best meets the demands of his community. If a state makes it impossible to include distant broadcast signals or advertiser-supported satellite services in that package, the value of his service to subscribers will be diminished, "probably caus[ing] a large but inherently immeasurable reduction in . . . subscriber revenue."[6] Remaining revenues may be insufficient to cover the costs of operating the system.

The Oklahoma prohibition is injurious to the suppliers of advertiser-supported cable services as well. In order to compete with the national television broadcast networks for the advertising revenues that support their services, ESPN and other cable programmers require a national audience of the largest possible size. Since the effect of Oklahoma's prohibition will be to shut out advertiser-supported program services from the state, the prohibition will undermine the services' efforts to build a national audience and their ability to compete.

The court of appeals analyzed the Oklahoma advertising prohibition as if it affected only "commercial speech,"

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[6] Pet. App. at 42a.

and held that, under this Court's decisions, a ban on the advertising of alcoholic beverages was permissible. As shown below, this holding was based on an erroneous application of those decisions. As applied to cable operators, however, the Oklahoma statute not only infringes commercial speech but also suppresses the distribution of all the programming that appears on the same service as the prohibited commercial speech—an even more serious First Amendment restraint. Moreover, the statute, by effectively prohibiting the carriage of certain broadcast and nonbroadcast signals, is inconsistent with and preempted by federal law. In general, as discussed below, the FCC has preempted all regulation of signal carriage by cable operators. Additionally, the statute in some instances prevents cable operators from carrying signals that the FCC's rules require them to carry—an inconsistency that the Supremacy Clause resolves by invalidating the state's requirement.

I. The Oklahoma Liquor Advertising Prohibition Is an Impermissible Restraint on Commercial Speech.

Viewed simply as a restraint on commercial speech, Oklahoma's prohibition on the advertising of alcoholic beverages is impermissible under the First Amendment. As this Court has repeatedly made clear during the last decade, even speech that does no more than "simply propose a commercial transaction" is entitled to First Amendment protection.[7] Although "[s]ome forms of commercial speech regulation—such as regulation of false

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[7] *Bigelow v. Virginia*, 421 U.S. 809, 822 (1975). *See also Bolger v. Youngs Drug Products Corp.*, 103 S. Ct. 2875 (1983); *In re R.M.J.*, 102 S. Ct. 929 (1982); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981); *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of N.Y.*, 447 U.S. 557 (1980); *Carey v. Population Services Int'l*, 431 U.S. 678 (1977); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

or misleading speech—'are surely permissible,'"[8] Oklahoma's prohibition is outside the limits of permissible regulation.

The sale of alcoholic beverages is not unlawful in Oklahoma. However, the state seeks, by prohibiting liquor advertising, "to reduce the sale and consumption of liquor, and thereby reduce the problems associated with alcohol abuse."[9] In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 773 (1976), this Court squarely addressed the question "whether a State may completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its dissemination and its recipients" and decided that the "answer . . . is in the negative." As the Court found,

> It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.

Id. at 770. A year later, in *Carey v. Population Services International*, 431 U.S. 678 (1977), the Court, relying on *Virginia State Board of Pharmacy, supra*, held that a state could not prohibit truthful advertising of legally available contraceptives in order to discourage their use and discourage illicit sexual activity.[10]

The court of appeals held, however, that Oklahoma's total ban on liquor advertising was permissible. Ignoring the unambiguous holdings of this Court that a state may not completely prohibit truthful advertising of a lawful product, the court of appeals reached its decision by mis-

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[8] *Linmark Associates, Inc. v. Township of Willingboro, supra*, 431 U.S. at 91-92 (quoting *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., supra*, 425 U.S. at 770).

[9] Pet. App. at 20a.

[10] *See also Metromedia, Inc. v. City of San Diego, supra*, 453 U.S. at 505 (1981).

applying the standards for reviewing restraints on commercial speech that this Court enunicated in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980). Under the "four-part" analysis described in that decision, the Court must

> determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

447 U.S. at 566.

Applying that test, the court of appeals held that, since the prohibited advertising concerned lawful activity and was not misleading, it was protected by the First Amendment. However, the court held that Oklahoma's interest in reducing alcohol consumption was substantial and that prohibiting advertisements for alcoholic beverages was permissible insofar as it directly advanced and was not more extensive than necessary to serve that interest. Under the court of appeals' approach, the *Central Hudson* test apparently supersedes this Court's earlier holdings that it is never permissible for a state to seek to suppress consumption of a lawful product by prohibiting the truthful advertising of that product. If a state could impose such a prohibition whenever it had a "substantial interest" in discouraging the product's use, the First Amendment protections afforded to commercial speech by those precedents would be vitiated.

This Court gave no indication of any intent, in *Central Hudson*, to overrule its precedents. To the contrary, its four-part test was designed to provide a comprehensive

synthesis of all the Court's holdings in the area of commercial speech. Thus, as the Court subsequently stated with respect to the *Central Hudson* standards,

> We recognize, of course, that the generalizations summarized above do not afford precise guidance to the Bar and the courts. *They do represent the general principles that may be distilled from our decisions in this developing area of the law.* As they are applied on a case by case basis . . . more specific guidance will be available.

In re R.M.J., 102 S. Ct. 929, 938 n.16 (1982) (emphasis added).

Indeed, in *Central Hudson* itself, the Court reaffirmed that it "has not approved a blanket ban on commercial speech unless the expression itself was flawed in some way, either because it was deceptive or related to unlawful activity." 447 U.S. at 566 n.9. A year later, in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 505 (1981), the Court made clear that nothing in *Central Hudson* had altered the fundamental holding that "[a] State may not completely suppress the dissemination of truthful activity merely because it is fearful of that information's effect upon its disseminators and recipients."

The court of appeals' "workmanlike" [11] application of the *Central Hudson* standards simply ignores the precedents of this Court on which those standards are based. Those precedents make clear that, if the state has a legitimate interest in discouraging use of a product, it may ban the product itself or it may publicize the product's defects and attempt to persuade the public not to buy it. Or it may, in some circumstances, regulate the "time, place and manner" in which the product

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[11] *See Dunagin v. City of Oxford, Miss.*, Nos. 80-3762, 82-4076, slip op. at 489 (5th Cir. Oct. 31, 1983) (Gee, J., dissenting).

is advertised.[12] But it may not shut off the flow of information about the product in the hope that, as a result, consumption will decline. *Central Hudson* provides that a regulation of commercial speech "may not be sustained if it provides only ineffective or remote support for the government's purpose . . . [or] if the governmental interest could be served as well by a more limited restriction on commercial speech." 447 U.S. at 564. Under the *Central Hudson* test, a flat prohibition on advertising is simply too indirect a method to advance the state's public policy goals [13] and is too broad a restraint on speech.[14]

This outcome is unaffected by the fact that, in the present case, the advertising at issue concerns alcoholic beverages. The Twenty-first Amendment gives states the unusual power to ban the importation of alcoholic beverages into the state—a power that would otherwise be forbidden by the Commerce Clause of the Constitution.

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[12] *See, e.g., Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., supra,* 425 U.S. at 771; *Linmark Associates, Inc. v. Township of Willingboro, supra,* 431 U.S. at 93; *Carey v. Population Services Int'l, supra,* 431 U.S. at 700.

[13] *See Central Hudson, supra,* 447 U.S. at 566 n.9: "We review with special care regulations that entirely suppress commercial speech in order to pursue a nonspeech-related policy. In those circumstances, a ban on speech could screen from public view the underlying governmental policy." *See also id.* at 579 (Blackmun, J., concurring): "If a governmental unit believes that use or overuse of air conditioning is a serious problem, it must attack that problem directly, by prohibiting air conditioning or regulating thermostat levels."

[14] Because cable operators in Oklahoma cannot delete wine advertisements carried on a program service, the Oklahoma ban effectively requires that the service either not carry such advertisements or forfeit its right to appear in Oklahoma. If, in order to ensure carriage by Oklahoma cable systems, the program service chooses the former, the restraint on commercial speech would be particularly overbroad. The effect in that case would be to suppress commercial speech even in states that do not share Oklahoma's interest in silencing speech proposing the sale of wine.

But the Twenty-first Amendment does not supersede the First Amendment or other Constitutional protections of individual rights,[15] and does not give states the power to ban truthful advertising of a lawful product. In holding to the contrary, the court of appeals erroneously relied on this Court's dismissal of the appeal in *Queensgate Investment Co. v. Liquor Control Commission*, 103 S. Ct. 31 (1982), "for want of a substantial federal question."

As the court of appeals stated, the regulations upheld in that case "prohibited off-premises price advertising by *holders of liquor certain liquor permits.*" Pet. App. at 7a (emphasis added). This Court has held that the Twenty-first Amendment empowers states to prohibit the sale of alcoholic beverages and, in some cases, to limit the time, place and manner in which such beverages are sold by imposing restrictions on licensed liquor establishments. Thus, in *New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 717 (1981) (*per curiam*), the Court held that "[t]he State's power to ban the sale of alcoholic beverages entirely includes the lesser power to ban the sale of liquor on premises where topless dancing occurs." Similarly, in *California v. LaRue*, 409 U.S. 109 (1972), the Court upheld a prohibition on acts of "gross sexuality" in establishments where liquor is served. In both cases, as in *Queensgate, supra*, the statute's prohibition "applie[d] only to establishments which [were] licensed by the State to serve liquor." *Bellanca, supra*, 452 U.S. at 716.

What is at issue in the present case, however, is not the extent to which states may regulate the activities or speech of licensed sellers of alcoholic beverages but the extent to which all advertising of the product itself may be prohibited, even where the advertiser is not a

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[15] *See, e.g., California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106-10 (1980); *Craig v. Boren*, 429 U.S. 190, 209 (1976); *Wisconsin v. Constantineau*, 400 U.S. 433, 436 (1971).

state licensee. The regulations upheld by this Court in *Queensgate* did not completely prohibit all advertising of alcoholic beverages in order to suppress their sale and consumption, and they applied only to price advertising by licensed retailers and not to advertising by producers of alcoholic beverages. Nevertheless, the court of appeals was inexplicably "confident that the constitutional question presented in *Queensgate* and in the present appeals is substantially the same," Pet. App. at 14a, and concluded that

> [w]hen the Twenty-first Amendment is considered in addition to Oklahoma's substantial interest under its police power, the balance shifts in the state's favor, permitting regulation of commercial speech that might not otherwise be permissible. We believe that the Supreme Court's summary dismissal in *Queensgate* mandates this result.

Id. at 24a.

The Twenty-first Amendment is relevant to this case, if at all, only to the extent that it arguably confirms that Oklahoma may have a legitimate and "substantial" interest in regulating the sale and consumption of alcoholic beverages.[16] But, as shown above, Oklahoma's advertising prohibition fails the *Central Hudson* test not because there is no substantial state interest but because, as this Court has consistently held, a total advertising

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[16] The manner in which Oklahoma has implemented its ban raises questions as to how substantial its interest in suppressing liquor advertising really is. Oklahoma permits such advertising to appear in newspapers and magazines that circulate within but are published outside the State. There is no meaningful basis for distinguishing between the circulation of out-of-state publications and the carriage by cable systems of out-of-state and national program services. Oklahoma's disparate treatment of different media for the dissemination of wine advertisements presents serious constitutional problems, and also suggests that Oklahoma's interest in banning wine advertisements that appear on cable systems is less substantial than the Court of Appeals assumed.

prohibition is an overbroad, indirect, and impermissible means of furthering that interest, even if it is substantial.

Both the court below and the United States Court of Appeals for the Fifth Circuit, in a recent decision upholding a liquor advertising prohibition,[17] have erroneously suggested that, since states are empowered by the Twenty-first Amendment to ban the sale of alcoholic beverages, they may take the "less restrictive" step of permitting the sale but prohibiting the advertising of such beverages. The Fifth Circuit has gone so far as to suggest, for example, that "there may be no First Amendment protection of purely commercial advertising of those products which the state *could* entirely proscribe." [18] But, as the decisions of this Court have made clear, the First Amendment requires a different conclusion as to which step is more restrictive. Banning the dissemination of truthful information regarding a lawful product is more intrusive on freedom of speech and the flow of ideas, and thus less permissible, than is banning the product itself.

II. The Advertising Prohibition Infringes Noncommercial Speech By Preventing Cable Operators From Carrying National and Out-of-State Program Services.

Focusing exclusively on the "commercial speech" aspects of this case, the court of appeals ignored the even more significant restraints on noncommercial speech that result from application of Oklahoma's liquor advertising prohibition to cable television's retransmission of distant broadcast signals and satellite-delivered nonbroadcast program services. By effectively preventing cable operators from carrying any such signals and services that may contain wine commercials, the statute unlawfully intrudes on the discretion of cable operators in selecting programming and of cable programmers in producing programming. It also

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[17] *Dunagin v. City of Oxford, Miss., supra.*

[18] *Id.*, slip op. at 474 (emphasis added).

drastically limits the viewing options and the flow of information available to Oklahoma residents. Such restraints on noncommercial speech go directly to the heart of the First Amendment.

Any governmental action that restricts available program sources and limits a media operator's editorial discretion in compiling and distributing a package of information to the public infringes basic First Amendment interests. *See Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974); *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973). The Oklahoma statute, even if intended only to suppress liquor advertising,[19] prevents cable operators from selecting and Oklahoma viewers from receiving out-of-state broadcast signals and national news, sports, information and entertainment services merely because those services may occasionally include wine commercials. Even if the commercials themselves were entitled to no First Amendment protection, this broad restraint on the national "free trade in ideas"[20] would be constitutionally impermissible. Short of a national emergency or a clear and present danger, no regulatory interest permits a state to surround itself with an "iron curtain" that prevents out-of-state information and communications from reaching its citizens.

It was just this sort of restraint on national and interstate communications media that worried this Court when it struck down Virginia's ban on abortion advertisements in *Bigelow v. Virginia*, *supra*, 421 U.S. at 828-29 (1975):

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[19] "Illicit legislative intent is not the *sine qua non* of a violation of the First Amendment . . . . We have long recognized that even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment." *Minneapolis Star and Tribune Co. v. Minnesota Comm'r of Revenue*, 103 S. Ct. 1365 (1983).

[20] *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

> If application of this statute were upheld under these circumstances, Virginia might exert the power sought here over a wide variety of national publications or interstate newspapers carrying advertisements similar to the one that appeared in Bigelow's newspaper or containing articles on the general subject matter to which the advertisement referred. Other States might do the same. The burdens thereby imposed on publications would impair, perhaps severely, their proper functioning. *See Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 257-58 (1974).

Although Virginia's prohibition was never applied to national or interstate newspapers or publications distributed in the state, the Court left little doubt that any such application—which could effectively preclude distribution of these newspapers and publications in Virginia—would run afoul of the First Amendment because

> [t]he policy of the First Amendment favors dissemination of information and opinion and "[t]he guarantees of freedom of speech and press were not designed to prevent 'the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential . . . .' 2 Cooley, Constitutional Limitations 886 (8th ed.)."

421 U.S. at 829, quoting *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 150 (1967) (opinion of Harlan, J.).[21]

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[21] In *Dunagin v. City of Oxford, Miss., supra*, the United States Court of Appeals for the Fifth Circuit upheld, as a lawful restraint on commercial speech, a statute that "bann[ed] intrastate liquor advertising while allowing advertising to enter Mississippi from out-of-state media." Slip op. at 486. However, the court thought it "exceedingly unlikely that the state could block, jam, or otherwise ban all magazines, newspapers, cable signals and radio and television broadcasts originating from other states that contain liquor advertisements, as a practical matter, and in the face of the Commerce Clause, the Supremacy Clause and the First Amendment." *Id.* at 487.

Oklahoma has similarly refrained from applying its prohibition on liquor advertising to newspapers and other publications printed outside the state. But by applying the law to commercials carried by the national or out-of-state program services that Oklahoma cable systems retransmit, the state restrains the flow of information just as surely as if it were to forbid distribution of The New York Times, The Wall Street Journal, Time and the New Yorker because they contained liquor advertisements.

Moreover, the statute severely restricts the ability of each Oklahoma cable operator to assemble that package of services that, in his judgment, best meets the needs and demands of his subscribers. Like newspapers, cable operators offer their subscribers a package of diverse entertainment and information, some of which they originate and some of which they obtain from other sources. No longer do cable systems merely retransmit local broadcast signals; like a newspaper, a cable system is "more than a passive receptacle or conduit for news, comment, and advertising." *Miami Herald Publishing Co. v. Tornillo*, *supra*, 418 U.S. at 258. As this Court found in *FCC v. Midwest Video Corp.*, 440 U.S. 689, 707 (1979), cable operators now exercise "a significant amount of editorial discretion regarding what their programming will include." [22]

While the Court has not had occasion to address specifically the First Amendment status of cable television, there can be no doubt that cable operators' editorial discretion in selecting programming is protected from gov-

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[22] *See also Community Cable TV, Inc.*, CSR-2269, FCC 83-525, ¶ 20 (Nov. 15, 1983):

> [V]igorous and growing competitors in the video services market pose a new challenge to nonbroadcast programming entrepreneurs and cable system operators . . . . The current situation requires that system operators and nonbroadcast programming entrepreneurs retain maximum flexibility in the marketplace to experiment with types of program offerings and methods to pay for such programs, *i.e.*, advertisers, subscriber fees, network compensation, or a combination.

ernmental intrusion. Lower courts that have considered the issue have generally confirmed that cable systems are media of expression whose programming and editorial discretion are protected by the First Amendment.[23] The Oklahoma statute effectively strips cable operators of this discretion and, with respect to advertiser-supported programming, makes cable little more than a retransmitter of local broadcast stations.

Any restraint on truthful advertising of a lawful product creates First Amendment problems. However, a law that prevents cable operators from offering, and state residents from receiving national program services and out-of-state broadcast signals goes far beyond the mere regulation of commercial speech. The state's interest in discouraging consumption of alcoholic beverages does not even justify the suppression of liquor and wine commercials. It cannot conceivably provide a legitimate basis for the suppression of the news, sports, information and entertainment programming that appears on the advertiser-supported services with those commercials.

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[23] *See, e.g., Home Box Office, Inc. v. FCC*, 567 F.2d 9, 48-51 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977); *Community Communications Co., Inc. v. City of Boulder*, 660 F.2d 1370, 1376 (10th Cir. 1981); *Midwest Video Corp. v. FCC*, 571 F.2d 1025, 1053-57 (8th Cir. 1978), *aff'd on other grounds*, 440 U.S. 689 (1979); *Community Television of Utah, Inc. v. Roy City*, 555 F. Supp. 1164 (D. Utah 1982); *Home Box Office, Inc. v. Wilkinson*, 531 F. Supp. 987 (D. Utah 1982); *Cruz v. Ferre*, No. 83-330 (S.D. Fla. Aug. 2, 1983). *But see Berkshire Cablevision of Rhode Island, Inc. v. Burke*, C.A. No. 82-0537P (D.R.I. Sept. 15, 1983).

Some courts have questioned the extent to which the First Amendment protects cable operators from regulations that do not directly affect program content and editorial discretion. *See, e.g., Omega Satellite Products v. City of Indianapolis*, 694 F.2d 119, 127-28 (7th Cir. 1982); *Community Communications Co., Inc. v. City of Boulder, supra*, 660 F.2d at 1377-79. However, no such questions apply where, as here, content control is at issue.

III. The Oklahoma Statute, As Applied to Cable Operators, Is Preempted by Federal Law.

As shown in Parts I and II, *supra*, any restrictions on the advertisements and on the noncommercial programming that cable operators may carry on their systems raise serious First Amendment problems—problems that can be triggered by federal restrictions as well as by state and local laws. However, to the extent that regulation of cable systems is constitutionally permissible and to the extent necessary to accomplish its statutory mandate, the FCC is authorized to determine the regulatory framework under which cable must operate.[24] Oklahoma's prohibition on the carriage of advertising of alcoholic beverages—and the effects of that prohibition—are inconsistent with the regulatory framework that the FCC has adopted. Where such inconsistency exists, the state law is preempted and invalidated by federal law.

This Court has developed a two-pronged test for determining when state laws are subject to federal preemption. First, a state statute is preempted where Congress has specifically "prohibited state regulation of the particular aspect of commerce involved," *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977), or has "sought to occupy the field to the exclusion of the States," *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978). Second,

> [e]ven when Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), or when

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[24] *See, e.g., United States v. Southwestern Cable*, 392 U.S. 157 (1968); *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972). *See also Computer and Communications Indus. Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 103 S. Ct. 2109 (1983).

> state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

Pacific Gas and Electric Co. v. State Energy Resources Conservation & Development Comm'n, 103 S. Ct. 1713, 1722 (1983); *Fidelity Federal Savings and Loan Association v. de la Cuesta*, 102 S. Ct. 3014, 3022 (1982).

Where Congress has delegated regulatory authority to an administrative agency, the agency has authority to preempt state and local laws: "Federal regulations have no less pre-emptive effect than federal statutes," and "[a] pre-emptive regulation's force does not depend on express congressional authorization to displace state law. . . ." *Fidelity Federal Savings and Loan Association v. de la Cuesta, supra*, 102 S. Ct. at 3023.

Under both prongs of the test, Oklahoma's liquor advertising prohibition is preempted by federal law. First, and most importantly, the FCC has explicity sought to occupy exclusively the field of signal carriage regulation and to preempt state and local laws and regulations that require a cable operator to carry or not to carry particular signals. Second, it is physically impossible, in some circumstances, for Oklahoma cable operators to comply both with FCC rules requiring carriage of certain broadcast signals and prohibiting deletion of commercials from those signals and with the state's prohibition on the carriage of advertising for alcoholic beverages.

The FCC has stated unambiguously its intention to occupy exclusively the field of signal carriage regulation: "The fact that this Commission has pre-empted jurisdiction of any and all signal carriage regulations is unquestioned." *Clarification of the Cable Television Rules and Notices of Proposed Rulemaking and Inquiry*, 46 F.C.C.2d 175, 178 (1974).[25] The basis for preempting

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[25] *See also Amendment of Part 76 of the Commission's Rules and Regulations Relative to an Inquiry on the Need for Additional*

state and local regulation of the services provided by cable systems has been the FCC's view that cable is an integral part of the nationwide communications system that Congress has charged the FCC with nurturing:

> The implications of the development of cable must be viewed as one part, albeit an increasingly important part, of a much broader communications complex . . . . The communications provided by broadcasters, common carriers, specialized carriers such as multipoint distribution services, satellites, etc., and cable must all be viewed with the objective of achieving a unified whole, a structure that will indeed accomplish the goal set for us in the Communications Act of a ". . . rapid, efficient, nationwide and worldwide radio communications service." [26]

In order to achieve this regulatory goal, "external effects, such as added regulation or regulation inconsistent with that adopted pursuant to our overall communications objectives must be considered and dealt with." [27]

In the 1960's and 1970's, the FCC believed that its overall regulatory goals would be served by *restricting* the signals that cable systems could carry. In an unabashed effort to protect local broadcasting, the Commission required cable operators to carry all local broadcast signals and severely limited the number of distant signals that cable operators could import for their subscribers.[28] When the FCC's distant signal limitations were in effect, a state or local rule requiring cable systems to carry more

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Rules in the Area of Duplicative and Excessive Over-Regulation of Cable Television (Dkt. No. 20272), Report and Order, 54 F.C.C.2d 855, 863 (1975) ("The subject areas this agency has preempted include, of course, signal carriage . . . .").

[26] *Id.* at 865.

[27] *Id.*

[28] *See Malrite TV of New York v. FCC*, 652 F.2d 1140, 1144 (2d Cir. 1981), *cert. denied*, 102 S. Ct. 1002 (1982).

than the permissible number of distant signals would clearly have been preempted.

In recent years, however, the FCC has reconsidered and substantially abandoned its view that the development of a nationwide communications service is somehow best fostered by restricting cable's ability to compete. Thus, in 1980, the FCC eliminated its restrictions on distant signal carriage, finding that

> the benefits to existing and potential cable households from permitting the carriage of additional signals are substantial. Millions of households may be afforded not only increased viewing options, but also access to a diversity of services that presently is unavailable in their communities.[29]

The FCC explicity decided that limiting signal carriage was inconsistent with its comprehensive regulatory scheme for the national communications marketplace.[30] This Court has made clear that

> "where failure of . . . federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute," States are not permitted to use their police power to enact such a regulation.

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[29] *Cable Television Syndicated Program Exclusivity Rules* (Docket No. 20988), Report and Order, 79 F.C.C.2d 663, 746 (1980), *aff'd sub nom. Malrite T.V. of New York v. FCC*, 652 F.2d 1140 (2d Cir. 1981), *cert. denied*, 102 S. Ct. 1002 (1982).

[30] The rules artificially restrict competition and thereby deny consumers services that they are willing to pay for. The rules also have the effect of restricting diversity in television programming by delaying or impeding the provision of new cable television service in many communities. Thus we conclude confidently that elimination of the distant signal carriage and syndicated exclusivity rules will enhance consumer welfare by promoting competition in both the economic marketplace and the marketplace of ideas.

Id. at 813-14 (1980).

Ray v. Atlantic Richfield Co., 435 U.S. 151, 178 (1978) (quoting *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767, 774 (1947)). Thus, the FCC's decision that limitations on signal carriage do not serve the public interest precludes state and local governments from imposing any such limitations.

The FCC's policy against limiting signal carriage preempts state restrictions not only on broadcast signal carriage but also on the carriage of nonbroadcast, satellite-delivered cable services. Thus, the FCC has "specifically declared that non-federal regulatory policies inconsistent with the federal objective of unregulated *availability* and pricing of *nonbroadcast* services were preempted." [31]

Although the purposes of the Oklahoma statute may simply be to prevent the dissemination of liquor advertising and to discourage liquor consumption, it is a law's effect and not its purpose that determines whether it is preempted. *Perez v. Campbell*, 402 U.S. 637, 652 (1971). The effect of the statute is to prevent cable operators in the state from carrying out-of-state broadcast signals and satellite-delivered cable services that may include wine commercials, thus restricting the availability of program sources and the development of new cable services. Indeed, the FCC has specifically addressed Oklahoma's advertising prohibition and found it to be directly at odds with its regulatory objectives:

> State controls over advertising on cable channels distributed by space satellite may both undercut the

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[31] *Community Cable TV, Inc.*, CSR-2269, FCC 83-525, ¶ 13 (Nov. 15, 1983) (emphasis added). "Thus, the Commission has deliberately preempted state regulation of non-basic program offerings, both non-broadcast programs and broadcast programs delivered to distant markets by satellite." *Id.*, ¶ 17. The FCC's preemption of rate regulation for nonbroadcast programming was upheld by the United States Court of Appeals for the Second Circuit in *Brookhaven Cable TV, Inc. v. Kelly*, 573 F.2d 765 (2d Cir. 1978), *cert. denied*, 441 U.S. 904 (1979).

> economic base for such services and render their operation on an interstate basis a practical impossibility . . . . The types of regulation promulgated by the state of Oklahoma in *Oklahoma Telecasters Ass'n v. Crisp*, 699 F.2d 450 (10th Cir. 1983), *petition for cert. filed sub nom. Capital Cities Cable, Inc. v. Crisp*, No. 82-1795, would thus undermine the goals of preemption articulated by the Commission in this and earlier cases.[32]

The statute, therefore, clearly "stands as an obstacle to the accomplishment and execution of the full purposes of" the Commission, and is preempted. *Hines v. Davidowitz*, *supra*, 312 U.S. 52, 67 (1941).

An additional basis for preemption is that, in some instances, it is impossible for cable operators to comply with both the Oklahoma statute and FCC rules. Although the FCC has eliminated its former restrictions on distant signal carriage, it still retains its rules requiring cable systems to carry local and nearby broadcast signals.[33] In many cases, Oklahoma cable operators located near the state's borders are required by these rules to carry out-of-state signals, most of which carry wine commercials.[34] FCC rules also prohibit cable operators from deleting com-

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[32] *Community Cable TV, Inc., supra*, ¶ 20 n. 26.

[33] *See* 47 C.F.R. §§ 76.57-76.61 (1982).

[34] For example, cable operators in southwestern Oklahoma are required to carry signals originating in Wichita Falls and Amarillo, Texas. Systems in southern and southwestern Oklahoma must retransmit signals from Texarkana, Arkansas; Shreveport, Louisiana; and Sherman, Texarkana and Denison, Texas. Eastern Oklahoma systems are required to carry signals from Fort Smith, Arkansas. Systems in northern and northeastern Oklahoma must carry signals from Joplin, Missouri, and Wichita and Pittsburg, Kansas. Without these "must carry" signals from out-of-state broadcasters, most border communities would, because of topographical and technological restraints, be deprived of major network telecasting.

mercials from the broadcast signals that they carry.[35] But if these cable operators carry the out-of-state "must carry" signals intact, then they will violate the Oklahoma statute each time a wine commercial appears. If, to comply with the Oklahoma statute, they refuse to carry these signals or delete all wine commercials, they violate FCC rules. The Supremacy Clause resolves such dilemmas by nullifying the state requirement insofar as it is inconsistent with federal law.

Thus, even if there were no affirmative intention on the part of the FCC to occupy the field of signal carriage regulation, the FCC's "must carry" rules and its rules prohibiting deletion of commercials would preempt the Oklahoma liquor advertising prohibition in those instances where they required carriage of such advertising. This partial preemption is, however, subsumed by the FCC's broader preemption of the entire field of signal carriage regulation—a preemption that, like the First Amendment, completely nullifies the statute's applicability to cable television's retransmission of out-of-state and national program services.

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[35] *See* 47 C.F.R. § 76.55(b) (1982). *See* also 17 U.S.C. § 111(c)(3) (Supp. V 1981).

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed.

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IN THE
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OCTOBER TERM, 1983

CAPITAL CITIES CABLE, INC., *et al.*,
Petitioners,
v.
RICHARD A. CRISP, DIRECTOR,
OKLAHOMA ALCOHOLIC BEVERAGE CONTROL BOARD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF NATIONAL LEAGUE OF CITIES AS AMICUS CURIAE

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Respondent.

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MOTION FOR LEAVE TO FILE BRIEF OF THE NATIONAL LEAGUE OF CITIES AS AMICUS CURIAE

The National League of Cities moves the Court under Rule 36 for leave to file the attached brief *amicus curiae* in the above-entitled case, and in support thereof states:

1. The National League of Cities ("NLC") is an Illinois not-for-profit corporation organized in 1933 to assist municipalities in performing their functions. In all, almost 15,000 cities and municipalities, both large and small, are members of and participate in the activities of NLC. The functions of NLC as authorized by its Bylaws include "the safeguarding of the interests, rights and privileges of municipalities."

2. The case calls upon the Court to determine whether States have authority to prohibit the advertising of wine

on programming transmitted from out-of-state sources over cable television systems. The Court's answer is of major concern to cities because of its potential impact on local regulation of cable systems through the franchise process.

3. NLC wishes to participate in this case in order to provide the Court with a broader understanding of the role of municipalities in the regulation of cable systems and the consequences which its decision could have for such entities. NLC believes that its views can assist the Court in recognizing that the First Amendment standards which apply to State regulation of the content of programming provided over cable systems should not necessarily be applied to local franchise requirements requiring the set aside of channels for access use.

4. Consent has been sought to the filing of this brief *amicus curiae* from all of the parties. Consent was refused by counsel for Cox Cable of Oklahoma City, Inc. et al.

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BRIEF OF THE NATIONAL LEAGUE OF CITIES AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

The interests of the National League of Cities are set out in the foregoing Motion.

INTRODUCTION

In almost all cases, cable television systems are constructed in the public rights-of-way. Consequently, a franchise or its equivalent must be obtained from the unit of government, usually a municipal government, which

has authority to grant cable franchises under state law. A franchise is a long-term grant of authority to operate a cable system in the public rights-of-way and the award is generally based on compliance with public service requirements rather than on an auction to the highest bidder. It is thus similar to the award of a broadcast station license by the Federal Communications Commission ("FCC").

A key public service requirement is frequently the set aside of channel capacity for the provision of communications services by public, educational, and governmental users and for the provision of services by commercial users who are not affiliated with the cable operator. The establishment of access requirements through the franchise process is well established. In this Session of Congress, the Senate has passed the "Cable Telecommunications Act of 1983," legislation that would affirm the authority of municipalities to require the set aside of channel capacity for public, educational, and governmental access use and authorize the establishment of additional access requirements, apparently including leased access requirements, through bilateral negotiations.[1]

The House of Representatives has under consideration similar legislation, also entitled the "Cable Telecommunications Act of 1983," which was introduced by Representative Timothy E. Wirth, Chairman of the House Energy and Commerce Committee's Subcommittee on Telecommunications, Consumer Protection, and Finance, on October 6, 1983, that would validate the establishment of certain types of public, educational, and governmental access requirements through the franchise process and establish federal leased access standards.[2]

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[1] *See* S.66, 98th Cong., 1st Sess. (1983), Secs. 606(a), 613(b), and 613(c). The bill was passed by the Senate on June 14, 1983 by a vote of 87 to 9, 129 CONG. REC. S8325-S8326.

[2] *See* H.R. 4103, 98th Cong., 1st Sess. (1983), Secs. 612, 613, and 631(d).

The validity of public, educational, and governmental access requirements has been challenged on First Amendment grounds in a pending lawsuit. In particular, a regulation of the State of Rhode Island requiring the set aside of at least one channel for public, educational, and governmental access use has been questioned.

The issue presented by the petition for certiorari in the instant case is limited to the power of a state, consistent with the First and Fourteenth Amendments, to bar truthful advertising of a lawful product—wine—on programming from out-of-state sources carried over cable television systems.[3]

The petition for certiorari places this issue in the broader context of the First Amendment rights of cable operators (pp. 18-19):

> This case is also important because it is the first case to come before this Court involving the power of the states under the First Amendment to regulate the content of cable television programming. As the number of cable subscribing households has grown from 2.8 million in 1968 to more than 31 million today [footnote omitted], state and local governments have increasingly sought to play a role in the regulation of cable program content. Such regulation raises vital First Amendment questions deeply affecting this increasingly important medium of communication.

Moreover, the petition analogizes cable operators to newspaper publishers for First Amendment purposes (p. 21).

The National League of Cities, which takes no position with respect to the merits of the case, appears here as *amicus* to draw the Court's attention to the access requirements included in numerous franchise agreements

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[3] *Berkshire Cablevision of Rhode Island v. Burke*, C.A. No. 82-0537 P (D.R.I., decided Sept. 15, 1983), finding that the State's access regulations were consistent with the First Amendment.

and to urge that the Court not reach the issue of the legality of these requirements under the First Amendment—the issue presented in *Berkshire Cablevision of Rhode Island, supra*, n.3—in resolving the validity of the Oklahoma ban on the carriage of wine commercials over cable systems.

SUMMARY OF ARGUMENT

The only First Amendment issued raised in the present case is whether the First Amendment bars a state from prohibiting liquor advertising on programming carried over channels of cable systems. The record presented to the Court in this particular case does not address the important separate issue of the applicability of the First Amendment to franchise requirements requiring the set aside of channel capacity for public, educational, governmental, or leased access use. That issue should be specifically reserved.

ARGUMENT

This case presents the First Amendment issues implicated by a state ban on the carriage of wine commercials over cable television systems, including commercials provided over a cable system in conjunction with programming originated outside of the state. The record before the Court does not address the separate issue of the First Amendment's applicability to access requirements established as part of the franchise. That issue should be reserved for later decision.

Each medium of expression "must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems," *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975); *Joseph Burstyn v. Wilson*, 343 U.S. 495 (1952). Because cable television systems are a relatively new medium of communication and because ongoing evolution in cable technology is having a major impact on the nature of communications services provided over cable systems, the

precise First Amendment standards which should govern the relatively new medium of cable television have yet to be established.

Cable television, because it is a hybrid medium, presents special problems for purposes of First Amendment analysis. For example, the Court has determined for certain purposes that cable television is similar to broadcasting. In *United States v. Midwest Video Corporation*, 406 U.S. 649 (1972), the Court ruled that, because cable systems so extensively carry broadcast signals, the FCC had authority to require that cable operators comply with certain provisions of Federal law governing broadcasting, particularly a requirement for locally originated programming. The Court reiterated this view in *FCC v. Midwest Video Corporation*, 440 U.S. 689 (1979), stating that cable television has become "enmeshed in the field of television broadcasting," 440 U.S. at 700. Congress has also applied to cable television the provisions of broadcast law which require equal opportunity for candidates for public office and fairness in the presentation of issues of public importance.[4]

Representatives of the cable television industry, relying primarily on language included in *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 45-46 (D.C. Cir. 1977), in which FCC rules limiting the types of programming services which could be provided over cable systems were invalidated, and *Midwest Video Corporation v. FCC*, 571 F.2d 1025, 1056 (8th Cir. 1978), in which FCC regulations requiring the set aside of access channels, based on

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[4] 47 U.S.C. § 315. See also First Report and Order in Docket No. 18397, 20 F.C.C. 2d 201, 219-220 (1969), adopting the rules requiring that cable operators, in conjunction with origination programming, provide equal time for candidates for public office and a reasonable opportunity for the discussion of differing views on controversial issues of public importance, requirements subsequently aodpted by Congress.

the FCC's statutory authority over broadcasting,[5] were found to be ultra vires, have argued that cable operators are telepublishers and, as such, are entitled to the same First Amendment protections as apply to newspaper publishers.[6]

Because of their use of public property (i.e., the public rights-of-way) for the distribution of information to the public, cable operators are more akin to broadcasters, which also use public property (i.e., the airwaves) for the distribution of information than to newspapers, which can operate without using public property. *See Community Communications Company, Inc. v. City of Boulder*, 660 F.2d 1370, 1377-1380 (10th Cir. 1981); *Omega Satellite Products v. City of Indianapolis*, 694 F.2d 119, 127-128 (7th Cir. 1982). Furthermore, it is the view of the *amicus* that a city, when it awards a franchise on the basis of public service requirements, including the establishment of access requirements, is acting in a manner that is consistent with the First Amendment.[7]

The Court's determination in *Red Lion Broadcasting Company v. FCC*, 395 U.S. 367 (1969), which was reemphasized in *Columbia Broadcasting System, Inc. v. FCC*, 101 S.Ct. 2813 (1981), in the statement that "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount," 101 S.Ct. at 2829,

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[5] In *Midwest Video Corporation, supra*, 440 U.S. at 709, n.19, the Court declined to decide the First Amendment issues raised by the FCC's access rules, indicating in a footnote, however, that the issue was not "frivolous."

[6] *See* Report of the National Cable Television Association to the Chairman of the Senate Committee on Commerce, Science, and Transportation, *Cable Television, Government Regulations and the First Amendment*, April 1981.

[7] *See Associated Press v. United States*, 326 U.S. 1 (1945); *Berkshire Cablevision of Rhode Island, Inc., supra*; Geller and Lampert, *Cable, Content Regulation and the First Amendment*, 32 Cath. Univ. L. Rev. 603, 622-627 (1983).

is as relevant for access channels on cable television systems as it is for broadcasting. The purpose of access requirements is to diversify the sources of information available to the public, not to restrict the content of programming provided on the cable system's other channels.

For present purposes, it is sufficient to point out the existence of these different issues and the differences between the impact of the Oklahoma law at issue and access requirements included in cable franchises on the operation of cable systems. Access requirements are structural in nature (i.e., content neutral) and designed to diversify the sources of programming provided over cable systems while the Oklahoma law is designed to regulate the content of all programming provided over a cable system. Thus, the record in the present case does not establish a basis for making a decision on the First Amendment issues presented by access requirements included in cable franchises. These issues should not be addressed until a case specifically involving the validity of access requirements is before the Court.

CONCLUSION

For the foregoing reasons, the issue of the validity of franchise requirements requiring the set aside of channel capacity for access purposes under the First Amendment should be expressly reserved.

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Respondent.

On Writ of Certiorari to the United States Court Of Appeals For the Tenth Circuit

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BRIEF OF S.A.N.E., INC. AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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OCTOBER TERM, 1983

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CAPITAL CITIES CABLE, INC.; COX CABLE OF OKLAHOMA CITY, INC.; MULTIMEDIA CABLEVISION, INC.; and SAMMONS COMMUNICATIONS, INC.,

Petitioners,

v.

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Respondent.

On Writ of Certiorari to the United States Court of Appeals For the Tenth Circuit

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BRIEF OF S.A.N.E., INC. AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

S.A.N.E., Inc., respectfully submits its brief amicus curiae in support of the Respondent. Pursuant to the rules of this Court, amicus has obtained and filed the written consents of each of the parties to the filing of this brief.

INTEREST OF AMICUS CURIAE

This Amicus brief has been submitted by S.A.N.E., Inc., a non-profit corporation organized to publicly combat the use and abuse of alcohol and illegal drugs by the people of the State of Oklahoma. S.A.N.E., has been organized and operating since January 15, 1960. S.A.N.E. is governed by a Board of Directors composed of responsible, leading citizens of the State of Oklahoma and is financed

by private contributions of citizens and organizations that support its goals.

Amicus believes that the issues presented before this Court will have a profound effect on the personal and social well-being of the people of the State of Oklahoma. Social problems resulting from the use and abuse of alcoholic beverages have been documented for decades. This country has wrestled with the problems of alcohol abuse on a national scale, and the states have faced similar responsibilities. Amicus' interest in the cause results from a conviction that the advertising of alcoholic beverages in Oklahoma is contrary to the public interest and welfare. Further, Amicus is convinced that the compelling state interest achieved by the advertising ban should be preserved for the well-being of our citizens.

Amicus requests this Court to uphold the constitutionality of the law in question.

SUMMARY OF ARGUMENT

Since achieving Statehood in 1907, Oklahomans have had a special concern for the problems resulting from the consumption of alcoholic beverages. This concern has been shown by the fact that from 1907 to 1959 the sale of intoxicating liquors was illegal and remained so in the face of repeated attempts at legalization. The advertising of intoxicating liquors was also illegal. In 1959 when the people of the State voted to allow the sale of alcoholic beverages, the ban on advertising was written into the new constitutional provision.

It has always been the belief of the people, as evidenced by their laws, that advertising leads to increased consumption. This fact has been established by recent studies. Furthermore, there is a positive correlation between increased consumption and increases in the well-known problems which result from alcohol use. This Court has recognized that "wide latitude" has been afforded the States in exercising their regulatory powers under the Twenty-first Amendment. This regulatory power "logically entails considerable regulatory power not strictly limited to importing and transporting alcohol." Oklahoma's ban on advertising should withstand a constitutional challenge based on the Supremacy Clause and First Amendment considerations because it is regulation supported by the Twenty-first Amendment and because when balanced against the other constitu-

tional interests presented by this case, public policy considerations dictate that it prevail.

Although First Amendment and Supremacy Clause considerations exist in the case most impediments to deletion of the advertising are economic or arise from economic considerations. The petitioners claim that deletion of the alcohol advertising would interfere with the First Amendment is not persuasive. It has never been established that it is technologically impossible to delete alcohol advertisements. Neither has it been established that the cable companies would suffer a real burden in comparison to the burden which would be placed on the State through increased alcohol consumption.

We urge that the decision by the Appeals Court be upheld.

ARGUMENT

THE TWENTY-FIRST AMENDMENT AND OKLAHOMA'S SPECIAL CONCERN FOR THE HEALTH AND WELFARE OF ITS RESIDENTS, PROVIDES A SUFFICIENT BASIS AND VALID REASON FOR UPHOLDING OKLAHOMA'S BAN ON THE IN-STATE RETRANSMISSION OF VIDEO PROGRAMMING WHICH CONTAINS ADVERTISEMENTS FOR ALCOHOLIC BEVERAGES.

A. ALCOHOLIC BEVERAGE ADVERTISING AND ITS ATTENDANT EFFECT ON ALCOHOL CONSUMPTION AND ABUSE PRESENTS A HEALTH HAZARD WHICH OKLAHOMA HAS RIGHTFULLY SOUGHT TO PREVENT.

Oklahoma's current ban on the advertisement of alcoholic beverages[1] came into existence in 1959[2] by a vote of the people, which also lifted Oklahoma's prohibition on the sale of intoxicating liquors.[3] Advertisements for the sale of intoxicating liquor had how-

[1] Okla. Const. Art. 27, §5

[2] "Article XXVII, Oklahoma Alcoholic Beverage Control Board, consisting of §§1 to 11, was adopted at election held April 7, 1959 (State Question No. 386, Referendum Petition No. 121), as proposed by Laws 1959, p. 479." Okl. Stat. Anno. 1981, p. 556.

[3] Okl. Const. Art. 1, §7.

ever, been illegal prior to 1959.[4] Inclusion of the ban on advertising was no doubt the result of certain compromises realistically required to obtain passage of the State Question.[5] The new constitutional provision in 1959 reflected Oklahoma's desire to permit the sale and consumption of alcoholic beverages, but at the same time to prevent and discourage activity which would promote consumption. Sales of alcoholic beverages by the drink were prohibited. Okl. Const. Art. 27, §4. Sales of alcoholic beverages on Sundays, election days and certain holidays were prohibited. Okl. Const. Art. 27, §6. And a regulatory distinction was made between beer containing not more than three and two-tenths percent alcohol by weight and that containing a greater amount. Okl. Const. Art. 27, §2. See also 37 O.S. 1981 §163.1 Oklahoma's new constitutional provisions in 1959 were clearly aimed toward preventing the same abuses prohibition had previously sought to ban while allowing sale and consumption under very limited circumstances.

Today, however, the argument is advanced that alcoholic beverages, because they are legally sold and consumed in Oklahoma, should be advertised where that advertisement is one originating outside the State and picked up for retransmission by a cable television company operating within the State. Those advancing this argument have nevertheless, understandably ignored the severe impact televised advertising of alcoholic beverages would have on this State.

The advertising of alcoholic beverages has been directly related to consumption and consumption in turn to abuse.[6] Advertising has been found to increase consumption by as much as ten percent,

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[4] *State v. Journal Co.*, 25 Okl. 180, 105 P. 655 (1910); *State ex rel West v. State Capital Co.*, 24 Okl. 252, 103 P.1021 (1909).

[5] This is indicated by the fact that several amendments to Oklahoma's Constitution, Art. 1, §7, had been submitted to the people and rejected. See, William R. Bands, Intoxicating Liquors in Oklahoma, 37-38, Okl. Stat. Anno. 1 at 4. Further evidence of compromise is seen in the fact that the amendment which successfully passed, Art. 27, §1, at seq., as well as subsequent enabling legislation, 37 Okl. Stat. §501, et seq., were very strict and comprehensive in their regulation of alcoholic beverages.

[6] "The rising toll of alcohol problems has been paralleled in the last two decades by greatly increased alcohol advertising and by increased consumption of alcohol." Michael Jacobson, George Hacker, and Robert Atkins, *The Booze Merchants*, CSPI Books, Washington, D.C.

encourage excessive drinking and have an impact on the values and behavior of consumers.[7]

Television advertising is a particularly effective means for increasing the consumption of alcoholic beverages. The wine industry certainly recognizes this fact. In 1981, a total of 130.1 million dollars were spent for wine advertising on television.[8] This reflected a 378 percent increase over the money spent in 1970.[9] The increase in television advertising of wine has worked. From 1970 to 1980 there has been a sixty-five percent increase in wine consumption.[10] Perhaps it was because of success like this that "[wine] advertising on television jumped by 30 percent in the first nine months of 1982 compared to 1981."[11] Wine consumption in 1980 was 2.08 gallons per person.[12] Experts claim that this rate should be able to be increased to a total of four gallons per capita in 1990.[13] Through the use of recently adopted marketing strategies aimed toward competition with non-alcoholic beverages,[14] in conjunction with television advertising, the prediction of further increased consumption may become a reality.

Not only is television advertising an effective means of increasing the consumption of alcoholic beverages such as wine, it also constitutes a means whereby high per capita consumption levels may be maintained in the future. "The primary attention of marketers appears focused on heavy drinkers, young people, and special categories such as blacks, women, and people who do not like the taste of alcohol."[15] When targeting these particular groups, television is a useful tool because an advertiser can simultaneously utilize both audio and visual techniques. A person does not have to be able to read to

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[7] *The Booze Merchants*, at 6 referring to a study done by Charles Atkin and Martin Block, *Content and Effect of Alcoholic Beverage Advertising*, Michigan State University, 1980. Prepared for the Bureau of Alcohol, Tobacco and Firearms, Federal Trade Commission, Department of Transportation and NIAAA.

[8] *The Booze Merchants*, at 3.

[9] *The Booze Merchants*, at 3.

[10] *The Booze Merchants*, at 3.

[11] *The Booze Merchants*, at 5, 6. See also, *Impact*, January 15, 1983.

[12] *The Booze Merchants*, at 3.

[13] *The Booze Merchants*, at 19. See also, *Business Week*, "Creating a Mass Market for Wine," March 15, 1983.

[14] *The Booze Merchants*, at 87. See also, Gavin-Jobson Associates, *The Wine Marketing Handbook*, 1979. New York, New York.

[15] *The Booze Merchants*, at 23.

be influenced by the advertising. Television, therefore, has the potential of being an effective means for influencing young people. Incidentally, much of the alcohol advertising on television is done while children and teenagers are watching.[16] Children are no doubt led to "believe that drinking is a part of grown-up life."[17] It has further been suggested that "some marketing practices indicate a conscious effort to make alcohol a way of life for people nearing the legal drinking age."[18] It has been through these techniques that companies have attempted to assure a future market for alcoholic bevarages at high per capita levels of consumption.

Generally, the states are allowed to exercise a large degree of discretion in the means they employ to protect their people from the evils incident to intoxicants. *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138, 139 (1939). Oklahoma has exercised this discretion by adopting laws which reflect a clear intent to prevent and discourage activity which would promote the consumption of alcoholic beverages. It is submitted that the ban on alcohol advertising, and particularly as applied to television advertising, represents a rational and reasonable means for asserting the State's objective of inhibiting the consumption of alcohol.

B. OKLAHOMA'S BAN ON THE RETRANSMISSION BY CABLE OF ALCOHOL ADVERTISING SHOULD PREVAIL WHEN TWENTY-FIRST AMENDMENT CONSIDERATIONS ARE WEIGHED AGAINST FIRST AMENDMENT AND SUPREMACY CLAUSE ISSUES.

The Twenty-first Amendment to the United States Constitution "has been recognized as conferring something more than the normal state authority over public health, welfare and morals." *California v. LaRue*, 409 U.S. 109, 114 (1972). The regulatory powers given the states under the Twenty-first Amendment have been also recognized as broad. *Larkin v. Grendel's Den, Inc.*, _____ U.S. _____, 103 S. Ct. 505 (1982); *California v. LaRue*, 409 U.S. 114. "Wide latitude" has been afforded the states in choosing the methods to be used to "accomplish a permissible end." *California v. LaRue*, 409

[16] *The Booze Merchants*, at 72.
[17] *The Booze Merchants*, at 71.
[18] *The Booze Merchants*, at 49.

U.S. 116. Furthermore, the state's power to control the "transportation on importation" of liquor within their boundaries derived from the Twenty-first Amendment "logically entails considerable regulatory power not strictly limited to importing and transporting alcohol". *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 107 (1980). Therefore, it should reasonably be concluded that the advertising of alcoholic beverages may be banned or strictly curtailed by a state.

The strength of this reasoning is however challenged when the advertising sought to be banned is mandated by federal law[19] and arguably comes into conflict with First Amendment[20] as well as Supremacy Clause[21] considerations. Whenever Twenty-first Amendment concerns have presented a potential conflict with concerns arising from other provisions of the United States Constitution, this Court has examined the circumstances surrounding the alleged conflict.[22] Implicit in the Court's decisions has been a certain weighing and balancing of constitutional interests[23] and, in two cases involving a potential conflict between First Amendment and Twenty-first Amendment interests the Court has found circumstances to weigh more heavily on the side of the Twenty-first Amendments interests. *New York State Liquor Authority v. Bellanca*, 452 U.S. 714 (1981); *California v. LaRue*, 409 U.S. 109 (1972).

The circumstances of the case now before the Court are varied and somewhat unique. Cable television systems as they exist today are a relatively recent innovation due in part to rapid technical advances which include satellite communications. With these innovations have come new opportunities to advertise and market products more efficiently on a nationwide basis. As a result government agencies such as the Federal Communications Commission (FCC)

[19] 47 U.S.C. §115 (a); 17 U.S.C. 111 (c) (3).

[20] U.S. Const., First Amendment.

[21] U.S. Const. Art. VI, cl 2.

[22] See e. g., *Larkin v. Grendel's Den, Inc.*, _____ U.S. _____, 103 S. Ct. 505 (1982); *New York State Liquor Authority v. Bellanca*, 452 U.S. 714 (1981); *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *Craig v. Boren*, 429 U.S. 190 (1976); *California v. LaRue*, 409 U.S. 109 (1972); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971).

[23] Id., See specifically, *New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 717 quoting *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975) as follows: "In *LaRue*, however, we concluded that the broad powers of the states to regulate the sale of liquor, conferred by the Twenty-first Amendment, outweighed any First Amendment interest in nude dancing" [Emphasis added].

have responded with regulations to smooth the transition from primarily broadcast television to a mixture of cable and broadcast services. In doing so attempts have been made to formulate regulations which accommodate the economic needs of the industry. One such attempt has been the FCC's so called "must carry rule". 47 C.F.R. §§76.57, 76.59, 76.61.

In each of the FCC's must carry rules the operative phase, "any such community unit may carry or request of the relevant station licensee or permittee, shall carry the signals. . . ." This rule has the appearance of being rooted primarily in the realm of economic considerations.

Although the policy of the FCC may be to ensure that the benefits of cable communication become a reality nationwide this policy should not dictate the manner in which a state exercises its regulatory duties under the Twenty-first Amendment. Congress and Federal Commissions should not be able to legislate away for reasons of regulatory convenience and industry economics, a state's control over the consumption of alcoholic beverages.[24] The First Amendment and Congress through the Supremacy Clause should not be allowed to so seriously circumvent a state's Twenty-first Amendment powers as is attempted in this case.

Another circumstance which deserves consideration is the claim that if cable operations were required to delete alcohol advertising from their programming, they would be so economically damaged as to prevent the distribution of communication which is protected by the First Amendment. The above reasoning of necessity assumes certain economic and technological facts. It assumes both currently and in the future, the technology required to delete advertising will either be unavailable or will be so expensive as to present an impossibility. Neither of these facts have been proven, nor should they be assumed. No one has ever proven that the deletion of alcohol advertising is actually impossible. It is common knowledge that electronic technology is an extremely fast changing field. Technologies which are available but expensive today may become cheap and readily available. Technology and economics do not provide a sound basis for decision.

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[24] See also, 17 U.S.C. 111 (c)3 which sets up copyright barriers to the deletion of advertising.

Furthermore, there is no way to tell what the actual impact would be on the availability of cable television programming in Oklahoma should the ban on advertising be upheld. There is no testimony as to what has happened when cable operations are required to delete advertising because this has never happened. The federal lawsuits were brought quickly and stays invoked which have deprived the Courts of these important facts save those arrived at through speculation. The impact on cable television of an alcohol advertising ban is a fact question which has never been satisfactorily resolved.

A decision involving the health, welfare and safety of Oklahoma's residents should not turn on what is merely practical or economical for an industry. In this case, the Court is asked to balance the interest of the State in protecting its residents against the pecuniary interests of certain advertisers, broadcasters and cable operators. Even if it were possible to show that protected First Amendment rights were being effected, we would submit that when a balance is sought between physical well-being and intellectual well-being, the former should more often prevail. Physical well-being should be considered a fundamental concern.

Accordingly, we urge the Court to find that Oklahoma's ban on the retransmission by cable companies of television advertising for alcoholic beverages should prevail when Twenty-first Amendment considerations are weighed against First Amendment and Supremacy Clause issues.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be upheld.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CAPITAL CITIES CABLE, INC.; COX CABLE OF OKLAHOMA CITY, INC.; MULTIMEDIA CABLEVISION, INC.; and SAMMONS COMMUNICATIONS, INC.,
Petitioners,

v.

RICHARD A. CRISP, DIRECTOR
OKLAHOMA ALCOHOLIC BEVERAGE CONTROL BOARD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF AMICUS CURIAE OF TURNER BROADCASTING SYSTEM, INC. AND FINANCIAL NEWS NETWORK IN SUPPORT OF WRIT OF CERTIORARI

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BRIEF AMICUS CURIAE OF TURNER BROADCASTING SYSTEM, INC. AND FINANCIAL NEWS NETWORK IN SUPPORT OF WRIT OF CERTIORARI

Turner Broadcasting System, Inc. ("TBS"), and Financial News Network ("FNN"), respectfully submit their brief amicus curiae in support of the Writ of Certiorari. Copies of the written consents of Petitioners and Respondent are being filed with this Brief pursuant to Rule 36.

INTEREST OF AMICI CURIAE

TBS is a diversified corporation whose principal holdings include a broadcast television station, two twenty-four hour all news cable television services, and several Atlanta professional sports teams. TBS owns and op-

erates WTBS, a UHF broadcast station licensed to service Atlanta, Georgia, which airs a diverse mix of children's and public affairs, family entertainment, and sports programs. The signal of WTBS is received locally by a Federal Communication Commission ("FCC")-licensed common carrier, and is transmitted by this carrier, via satellite, to over 5,600 cable systems nationwide. Through this combination of satellite and cable systems' retransmission, WTBS is available in over 27.6 million households and has become known as a "superstation": a broadcast station whose signal is received far beyond its local service area.[1]

While WTBS is technically a local Atlanta broadcast station, the fact that it is viewed nationwide by millions of households permits the station to sell advertising time at national rates to companies seeking a national audience. The sale of national advertising is the source of WTBS' revenues. Cable systems do not compensate WTBS directly for the use of its signal on their system.

TBS also owns and operates two non-broadcast cable television news services: Cable News Network (CNN) and CNN Headline News.[2] CNN, which began opera-

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[1] This scheme of retransmission of a broadcast signal by cable systems and common carriers is made possible by the compulsory license system adopted by Congress in the 1976 Copyright Act, 17 U.S.C. § 101, *et seq. See also Eastern Microwave, Inc. v. Doubleday*, 691 F.2d 125 (2d Cir. 1982), *cert. denied*, 103 S.Ct. 1232 (1983). Section 111 of the Copyright Act establishes a compulsory license system that permits cable systems to rebroadcast the signals of distant broadcast signals (signals originating outside the service area of the cable system) without the permission of the originating broadcast station, provided the cable system pays a royalty fee based on a percentage of the system's gross revenues. 17 U.S.C. § 111(c). These royalty fees are collected by a government agency, the Copyright Royalty Tribunal, and distributed to eligible copyright holders. 17 U.S.C. § 111(d).

[2] Carriage by cable systems of CNN and CNN Headline News is a matter of direct negotiations between CNN and the cable operators; these services are not covered by the compulsory license in Section 111 of the Copyright Act.

tion in 1980, provides over 3,750 cable systems and 21.6 million households throughout the country with twenty-four hour news programming. CNN's unique programming is available solely via cable. Its companion news service, CNN Headline News, launched in early 1982, provides continuous headline summaries of daily national and international news and is currently viewed in over 3.5 million cable homes.[3]

Unlike WTBS, TBS enters into contracts directly with cable systems for carriage of CNN and Headline News. The contract specifically provides that the affiliate may not delete any commercials or other program segment, alter, delay, or in any other manner interfere with the integrity of CNN's transmission. In this way a cable system's affiliation greatly differs from a local broadcast station's affiliation with one of the three major networks, when the local broadcast station provides much of the programming aired. A cable system's involvement is to make an initial editorial judgment about whether or not to carry CNN or Headline News and, having decided to carry the service, it does not then become involved in its program decisions.

All three of TBS' cable program services are carried by cable systems within Oklahoma.[4] All three TBS program

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[3] Both CNN and Headline News originate from studios in Atlanta, Georgia, although both services utilize programming that is produced in other CNN bureaus. Affiliated cable systems do not provide any of the programming that is seen on CNN. This programming is transmitted from Atlanta to a satellite which in turn beams the programming nationwide. A cable system that carries one or both of the services obtains the programming by using a satellite receive earth station.

[4] II R 32-33, 34-35, 53. While the record clearly refers to the carriage of WTBS in Oklahoma, it does not contain any references to carriage of CNN and Headline News. Currently, 112 Oklahoma cable systems serving 361,496 subscribes carry CNN, while 12 cable and broadcast stations serving 173,019 viewers carry Headline News.

services contain advertisements for various brands of wine.[5] As such, their carriage by a cable system in Oklahoma would be illegal, unless the offending commercials were deleted.[6]

FNN produces nationwide, comprehensive, business, finance, market and economic television news programming, now carried by over 600 cable systems, whose subscribership is in excess of 11 million homes. Dedicated cable systems carry FNN's programming 12 hours per day (7 a.m.-7 p.m. EST), Monday through Friday. FNN is also seen on 14 UHF stations who generally carry between five to nine hours of FNN's programming.

FNN is a relatively new cable network, having commenced distribution on November 30, 1981. FNN earns substantially all of its revenues through the sale of advertising time. Under its advertising agreements with its cable affiliates, those cable affiliates may not delete any national commercials or other program segment, alter, delay or in any manner interfere with the integrity of FNN's programming transmission.

FNN is currently on approximately 25 cable systems with a subscribership of approximately 249,678 homes in the state of Oklahoma, as well as on KAVT-TV, Oklahoma City, Oklahoma.

SUMMARY OF ARGUMENT

CNN, CNN Headline News, FNN, and WTBS are cable programmers that provide informational and entertainment programs designed exclusively or primarily for cable television. They and other cable programmers are indisputably engaged in noncommercial speech protected

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[5] II R 33, 39. Again, the record does not contain references to wine commercials on CNN and Headline News, but both services carry such advertisements. WTBS is explicitly cited in the record.

[6] Oklahoma Alcoholic Beverage Control Act, 37 Oklahoma Statutes Ann. § 516 (1982). *See also*, Okla. Const. art. 27, § 5.

by the First Amendment. The Oklahoma alcoholic advertising ban operates effectively to abridge the First Amendment rights of TBS and FNN and to limit the First Amendment rights of the viewing public of Oklahoma by interdicting the transmission of noncommercial speech because it is realistically impossible for cable operators to delete commercials from these program offerings. This damage to the First Amendment rights of cable programmers is particularly serious because cable systems represent such programmers' exclusive means of reaching the public. Hence, for cable programmers Respondent has not left open "ample alternative channels for communication."

Respondent cannot advance a compelling state interest to justify the abridgement of noncommercial speech by cable programmers. The fact that Respondent may have no intent to abridge such speech is irrelevant. The Twenty-first Amendment and the scope of Oklahoma's authority under it do not provide the interest to justify suppression of noncommercial speech.

Even if Oklahoma's interests were regarded as compelling, its abridgement of noncommercial speakers such as CNN cannot be excused in light of Respondent's inconsistent application of that interest. By tolerating wine advertising in other media, Respondent abridges the First Amendment rights of cable programmers by favoring one set of speakers over another. Further, its inconsistent application of the Oklahoma commercial ban clouds the seriousness with which the state views its interests.

ARGUMENT

I. INTRODUCTION

CNN, CNN Headline News, FNN and WTBS are part of a recent phenomenon, cable programmers, made possible by the growth of the cable industry and the development of a satellite-based national cable programming distribution system. Today, this program industry includes over fifty national and regional programming services that provide entertainment and sports programming and specialize in such areas as news, financial, or other informational services, coverage of congressional deliberations, and children's, health, religious and minority-oriented programming.

Some of these cable programmers, such as Home Box Office and The Disney Channel, carry no advertising, and receive their revenues from cable operators, who typically charge cable subscribers a fee for each of these programming services. Many cable programmers, however, sell and air advertising to provide necessary operating revenue. Such advertising frequently includes wine commercials.

Wine commercials cannot be legally deleted by cable systems from WTBS, FNN, CNN or CNN Headline News. First, federal law forbids a cable system from deleting the commercials of a distant broadcast station like WTBS carried on their system. The Copyright Act of 1976 denies cable systems the protection of the compulsory license if they willfully delete commercial advertisements from a broadcast signal they retransmit, 17 U.S.C. § 111(c)(3). The cable operator's contract with TBS regarding carriage of CNN and Headline News and its similar contract with FNN bars the operator from removing commercials. TBS would regard such a deletion as a violation of its CNN and Headline News copyright.

Moreover, the deletion of such commercials from cable programming services, like CNN, is impractical for the cable operator. CNN does not provide notice to cable operators as to when wine commercials will air. In fact, many CNN commercials are not prescheduled, as its schedule is altered as news events warrant. As a technical matter, consequently, the task of deleting specific commercials is nearly impossible.[7] As the district court unambiguously found, "there exists no feasible way for Plaintiffs to block out the [wine] advertisements" carried on the cable program services. *Cable-Com General, Inc. v. Crisp*, Pet. App. at 41a. While acknowledging that "the cable operators especially are placed in a difficult position," *Oklahoma Telecasters Ass'n v. Crisp*, 699 F.2d 490, 502 (10th Cir. 1983), the Tenth Circuit did not disturb this factual finding. Thus, the record clearly establishes that the effect of the Oklahoma statute will be to force upon cable operators the only other alternative: i.e., to drop non-broadcast cable program services, like CNN, FNN, and Headline News, that carry prohibited commercial advertising.

Amici would be thus directly affected by Respondent's enforcement of the Oklahoma statute. If the Tenth Circuit is affirmed, cable systems will most likely be forced by federal law and technological limits to discontinue carriage of all three TBS program services. Thus, the Oklahoma statute and Respondent's enforcement policy will effectively bar all three TBS program services and FNN from the state of Oklahoma.

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[7] The FCC once studied the feasibility of allowing cable systems to delete advertising from distant signals but concluded that the idea was unworkable. *Cable Television Report and Order* (Docket Nos. 18397, et al.) 36 FCC 2d 143, 165 (1972), *aff'd sub nom. American Civil Liberties Union v. FCC*, 523 F.2d 1344 (9th Cir. 1975). A cable system thus stands in a different technical and contractual position vis-a-vis CNN, FNN and other cable programmers than do broadcast affiliates to their networks. *Compare, Oklahoma Alcoholic Beverage Control Board v. Heublein Wines, International*, 566 P.2d 1158 (Okla. 1977).

Amici agree fully with the contentions of Petitioners that the Oklahoma statute as applied is an unconstitutional restriction on commercial speech, but will not reiterate those arguments here.[8] Amici submit this Brief to raise a separate point—the Oklahoma statute constitutes an unconstitutional abridgement of the dissemination of noncommercial speech by cable programmers.

II. THE OKLAHOMA STATUTE'S BAN ON LIQUOR ADVERTISEMENTS DIRECTLY ABRIDGES THE FIRST AMENDMENT RIGHTS OF CABLE TELEVISION PROGRAMMERS TO PROVIDE, AND OKLAHOMA VIEWERS TO RECEIVE, NONCOMMERCIAL SPEECH

1. Nonbroadcast program services, like those of Amici TBS and FNN, that provide informational and entertainment programming designed exclusively or primarily for cable television systems are indisputably engaged in speech protected by the First Amendment. *See, e.g., Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-502 (1952) (motion pictures protected by the First Amendment); *Winters v. New York*, 333 U.S. 507, 510 (1948); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 43-51 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829 (1977). It is well settled that "[e]ntertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatical works, fall within the First Amendment guarantee." *Schad v.*

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[8] Amici also agree with Petitioners' arguments that federal law preempts Oklahoma's regulation as it pertains to cable programmers. We also wish to emphasize, as have Petitioners, that the constitutionality of the FCC's so-called must carry rules is currently under challenge in two cases before the United States Court of Appeals for the District of Columbia Circuit. *Turner Broadcasting System, Inc. v. Federal Communications Commission*, D.C. Cir. No. 83-2050 (filed October 4, 1983); *Quincy Cable TV, Inc. v. FCC*, D.C. Cir. No. 83-1283 (filed May 31, 1983).

Borough of Mount Ephraim, 452 U.S. 61, 65 (1981) (citations omitted).[9]

The independent First Amendment rights of the public are also at stake in any government effort that interdicts their access to the national "free trade in ideas."[10] Access to diverse programming by the viewing public is, in fact, the "paramount" First Amendment interest in regulation of the electronic media. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969). As the Tenth Circuit itself has noted, "the First Amendment interests of cable viewers cannot be left out of the equation for permissible regulation of cable companies." *Community Communications Co., Inc. v. City of Boulder*, 660 F.2d 1370, 1376 n.5 (10th Cir. 1981). The First "Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public. . ." *Associated Press v. United States*, 326 U.S. 1, 20 (1945); *see National Association of Theatre Owners v. FCC*, 420 F.2d 194, 207 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 922 (1970). Public affairs programming, like that offered by CNN, FNN, and Headline News, "is unquestionably . . . the kind of speech the First Amendment was primarily designed to keep within the area of free discussion," *New York Times Company v. Sullivan*, 376 U.S. 254, 297 (1964), because "speech concerning public affairs is more than self-expression; it is the essence of self-government," *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964).

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[9] Even more clearly within the protection of the First and Fourteenth Amendments, are FNN, CNN and Headline News that provide news programming, the type of programming that lies at the core of the First Amendment's concern. *See, Winters v. New York, supra.* WTBS also contains several news programs and substantial amounts of non-entertainment, public affairs programming.

[10] *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

The Oklahoma alcoholic advertisement ban operates effectively to eliminate the First Amendment rights of TBS and FNN and to limit severely those of the viewing public in Oklahoma. Unlike local broadcast stations who have the ability to delete national commercials, cable operators will have no choice but to drop these signals, as well as those of other distant broadcast stations and cable program services that carry wine advertising, because it is illegal under federal law for a cable operator to delete commercials from WTBS and both technically impractical and a violation of their contracts to delete them from FNN, CNN and Headline News.

The damage to the First Amendment rights of cable programmers here is particularly serious because, as a practical matter, cable systems represent the exclusive distribution means of speaking to Oklahoma viewers for such programmers. For most cable programmers, and particularly for CNN, Oklahoma's statute and regulations do not "leave open ample alternative channels for communication." *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 93 (1977); *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (1976); *Schneider v. State of New Jersey*, 308 U.S. 147, 163 (1939). There can thus be no question that Respondent has abridged the rights of noncommercial cable programming speakers by imposing conditions that will effectively bar them from communicating to the State of Oklahoma.

2. Respondent cannot advance a compelling state interest to justify the abridgement of noncommercial speech by cable programmers. The Tenth Circuit erred by analyzing this case as if it presents only an issue of commercial speech, and never examined its impact on noncommercial speech. *See* 699 F.2d 498-502. While, in fact, the intent of the Oklahoma statute may be to regulate only certain commercial messages, its effect is far broader and more severe, wreaking havoc on the

rights of cable programmers to send and the public to receive noncommercial programming. As this Court has made clear, every restriction on commercial speech "must be examined carefully to ensure that speech deserving of greater constitutional protection is not inadvertently suppressed." *Bolger v. Youngs Drug Products Corp.*, —— U.S. ——, 103 S.Ct. 2875, 2880 (1983). Because the commercials are an integral part of the total cable program and cannot be separated legally or practically, Oklahoma's restriction on commercial speech does suppress speech deserving of greater constitutional protection. A statute which merely bans every fifth word in a book cannot be held harmless when it makes reading the book impossible.

Given this broad effect, Oklahoma's more limited intent cannot excuse its actions. As this Court just recently reaffirmed, "[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment,"[11] because "even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment."[12] To protect vital speech, the Court must look at the statute's effect as well as its intent when suppression of that speech is "an unintended but inevitable result of the government's conduct . . ." *Buckley v. Valeo*, 424 U.S. 1, 65 (1976) (per curiam).

The Tenth Circuit's exclusive focus upon commercial speech does not justify, but helps to explain, its decision. Whereas commercial speech is entitled to lesser protection and provides greater latitude for the furtherance of government interests, *Central Hudson Gas & Electric*

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[11] *Minneapolis Star and Tribune v. Minnesota Commissioner of Revenue*, —— U.S. ——, 103 S.Ct. 1365, 1376 (1983); *see NAACP v. Button*, 371 U.S. 415, 439 (1963); *NAACP v. Alabama*, 357 U.S. 449, 461 (1958); *Lovell v. Griffin*, 303 U.S. 444 (1938).

[12] *Minneapolis Star and Tribune, supra; see, Schneider v. State*, 308 U.S. 147 (1939).

Corp. v. Public Service Commission, 447 U.S. 557 (1980); *Virginia State Board of Pharmacy, supra*, when government directly restricts discussion of noncommercial topics, "the state action may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest." *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 540 (1980); *see First National Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978); *Buckley v. Valeo*, 424 U.S. at 25.

Respondent has not argued that the regulation of alcoholic beverage commercials is undertaken pursuant to a compelling state interest, and the Tenth Circuit's opinion does not rely upon such a theory. Instead, the Tenth Circuit asserts that the interest of Oklahoma in prohibiting the advertising of alcoholic beverages "is substantial." 699 F.2d at 500. Even if such an interest may arguably justify a narrow restriction on commercial speech, it cannot justify the suppression of noncommercial speech that lies at the heart of the First and Fourteenth Amendments.

The Twenty-first Amendment and the scope of Oklahoma's authority under it require no different result. State liquor laws are not immune from constitutional scrutiny. This Court has struck down such laws found in violation of the First Amendment, *Larkin v. Grendel's Den, Inc.*, —— U.S. ——, 103 S.Ct. 505 (1982), the Equal Protection Clause of the Fourteenth Amendment *Craig v. Boren*, 429 U.S. 190 (1976), and federal procedural due process requirements, *Wisconsin v. Constantineau*, 400 U.S. 433 (1971).[13] Certainly Oklahoma has asserted no interest so fundamental that it justifies lock-

[13] Liquor laws have also been found wanting under the federal antitrust laws passed under the Commerce Clause, *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) and the Export-Import Clause, *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964).

ing out the news and public affairs voices of services such as CNN and FNN.[14]

"Regardless of the particular label, . . . a court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation." *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975). The Oklahoma statute, by rendering the carriage of WTBS, CNN, FNN and Headline News impossible or infeasible, has directly infringed upon the First and Fourteenth Amendment rights of TBS and FNN as noncommercial speakers and serves no state interest of sufficient weight to merit it.

3. Even if Oklahoma's interest, *arguendo*, were regarded as compelling, its abridgement of the rights of noncommercial speakers such as CNN cannot be excused in light of Oklahoma's inconsistent application of that interest. Oklahoma's Constitution[15] and state laws[16] forbid anyone or any company from advertising alcoholic beverages within the state. These prohibitions have been interpreted by the state as applying to broadcast stations whose signal originates within Oklahoma,[17] but the Oklahoma Attorney General has not applied this ban to advertising appearing in magazines, newspapers or other print media originating outside Oklahoma, *see Oklahoma Telecasters*, 699 F.2d at 493 n.1, 502, even

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[14] This case is thus much different than those involving "grossly sexual" conduct or control of conduct in establishments licensed to sell liquor where the exercise of Twenty-first Amendment authority was upheld by this Court. *See New York State Liquor Authority v. Bellanca*, 452 U.S. 714 (1981); *California v. LaRue*, 409 U.S. 109 (1972).

[15] Oklahoma Constitution, art. 27, § 5.

[16] Oklahoma Alcoholic Beverage Control Act, 37 Oklahoma State Ann. § 516 (1982).

[17] *See Oklahoma Alcoholic Beverage Control Board v. Heublein Wines*, 566 P.2d 1158, 1160, 1162 (Okla. 1977) (upholding this ban as constitutional).

when those periodicals are designed for the Oklahoma market. *See e.g.*, Op. Okla. Att'y Gen. No. 76-348 (Nov. 24, 1976).

On May 19, 1980, the Oklahoma Attorney General revised the state's previous policy and issued an opinion that the prohibition on alcoholic beverage advertising would be applied to cable television, even on those channels originating out-of-state. Op. Okla. Att'y Gen. No. 79-334 (Mar 19, 1980). The opinion was reinforced by oral and written threats by the state to all Oklahoma cable operators, threatening prosecution if they carry such commercials. 699 F.2d at 492.

The State of Oklahoma has in this manner chosen to enforce its alcoholic beverage commercial ban in a selective and discriminatory manner. It has selected only out-of-state originated cable programming amongst all non-Oklahoma media upon which to apply its ban and has exempted all others from its criminal sanctions. This selective and uneven application of a statute in a manner that directly impedes the First and Fourteenth Amendment rights of some speakers, but not others, renders that statute as applied by respondent constitutionally flawed.

Oklahoma thus independently abridges the First Amendment rights of cable programmers by favoring one set of speakers, the print media, over other speakers, cable programmers. The First Amendment forbids governmental efforts to favor one speaker over another. *See Carey v. Brown*, 447 U.S. 455, 462-63 (1980); *First National Bank of Boston v. Belloti*, 435 U.S. 765, 784-85 (1978); *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92, 96 (1972). "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Buckley v. Valeo*, 424 U.S. 1, 48-9 (1976). As this court has recently noted, "[a]lthough the city may dis-

tinguish between the relative value of different categories of commercial speech, the city does not have the same range of choice in the area of noncommercial speech to evaluate the strength of, or distinguish between, various communicative interests." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 514 (1981) (plurality opinion) (citations omitted). By elevating some speakers over others, Oklahoma has created an impermissible hierarchy of noncommercial speech, which has no basis in the record and no place in constitutional law.

Furthermore, Respondent's inconsistent application of the Oklahoma commercial ban raises doubt about the seriousness of the state's interest in utilizing this means to achieve its goal of reducing alcoholic consumption.[18] As this Court has recognized in a similar context, "[t]he exceptions do not create the infringement, rather the general prohibition does. But the exceptions to the general prohibition are of great significance in assessing the strength of the city's interest in prohibiting billboards." *Metromedia, Inc.*, 453 U.S. at 520. *See also Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 73 n.14 (1981). By exempting other media from its prohibition though they stand on similar footing, the state "necessarily has conceded that some communicative interests . . . are stronger than its competing interests. . ." *Metromedia, Inc.*, 453 U.S at 520-21. Yet, Oklahoma cannot justify why one medium can pass this threshold test and others do not.

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[18] This is not one of those unusual instances where the different characteristics of the media involved justify differing treatment. *Compare FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). Neither obscenity nor broadcasting's unique accessibility to children, for example, have been put not at issue here. *Id.* Wine advertising in print and on television do not differ greatly. Certainly Oklahoma has asserted no defensible rationale for the distinction, and Respondent is not permitted to advance belatedly such a justification now. *See, e.g., Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156 (1962).

The failure of the state to justify its incomplete pursuit of its alcoholic beverage commercial policy clouds the seriousness with which the state views its interests here. Both the nature of the interest and the state's consistency in pursuing the policy are essential elements in the weighing of conflicting interests. Oklahoma's interests are insufficient, even as described by Respondent, to justify the intrusion into speech occasioned by the statute; diluted by inconsistent and half-hearted application, these interests are overwhelmed by the contrary interests of the public and cable program providers. Hence, the abridgement of the First Amendment rights of cable programmers cannot be sustained.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

CAPITAL CITIES CABLE, INC., ET AL., PETITIONERS

v.

RICHARD A. CRISP, DIRECTOR, OKLAHOMA ALCOHOLIC BEVERAGE CONTROL BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF THE FEDERAL COMMUNICATIONS COMMISSION AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether the State's regulation of liquor advertising, as applied to out-of-state broadcast signals, is valid in light of existing federal regulation of cable broadcasting.

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INTEREST OF THE FEDERAL COMMUNICATIONS COMMISSION

Under the Communications Act of 1934, 47 U.S.C. (& Supp. V) 151 *et seq.*, the Federal Communications Commission has authority over all interstate and foreign communications by wire and radio—including cable television systems—for the purpose of making available "to all the people of the United States a rapid, efficient, Nationwide, and world-wide wire and radio communication service." 47 U.S.C. 151, 152(a). The Oklahoma law requiring state cable television systems to delete liquor advertisements from television signals that they carry has a significant impact on the regulatory scheme administered by the Commission. The advertising ban, if enforced, will prevent some cable system operators from complying with valid Commission regulations that,

among other things, specifically prohibit deletion of any part of a retransmitted broadcast signal, including commercials. The Oklahoma law, moreover, will hinder the provision of television service to rural and other areas of Oklahoma that receive all or most of their television service from cable retransmission of out-of-state television signals. The Oklahoma provision upheld by the court below thus undermines the longstanding federal policy of encouraging the widest availability and diversity in television.

This Court has directed the parties to brief and argue, in addition to other questions presented by the petitioners, the question: "Whether the state's regulation of liquor advertising, as applied to out-of-state broadcast signals, is valid in light of existing federal regulation of cable broadcasting." The Commission will limit its discussion as amicus curiae to this question.[1]

STATEMENT

The State of Oklahoma prohibits the advertising of alcoholic beverages, except by means of strictly regulated on-premises signs. Oklahoma Alcoholic Beverage Control Act, Okla. Stat. Ann. tit. 37, § 516 (West Cum. Supp. 1982); Okla. Const. Art. XXVII, § 5. This provision was originally adopted by public referendum, as part of a state constitutional amendment that replaced Oklahoma's prior ban on the sale and consumption of alcoholic beverages with a system of local option. For a number of years, the advertising ban has been enforced against television broadcast stations in Okla-

[1] To the extent necessary to address the effect of the Oklahoma provision on the regulatory framework of the cable industry as a whole, our discussion will encompass "cablecasting," *i.e.*, video programming not carried over television broadcast stations (see 47 C.F.R. 76.5(v)), as well as broadcasting. Cablecasting includes, for example, such satellite-delivered, national cable programming services as Home Box Office (HBO), Cable News Network (CNN), and USA Network. See *United States* v. *Midwest Video Corp.*, 406 U.S. 649, 651, 653 n.6 (1972).

homa that transmit national network programs containing wine advertisements.[2] Notwithstanding the apparent breadth of the advertising ban, the Oklahoma Attorney General has ruled that the law does not apply to out-of-state print media sold in Oklahoma, and until 1980 the law was not enforced against cable television systems retransmitting out-of-state broadcast signals (Pet. App. 4a, 5a n.1, 23a-24a). In March 1980, however, the State Attorney General issued an opinion in which he concluded that retransmission of wine commercials by cable television systems violates Oklahoma law.[3] Cable operators were therefore notified that they would be criminally prosecuted if such advertising were carried over their systems (Pet. App. 4a, 41a).

In March 1981, petitioners, several Oklahoma cable systems, filed suit in the United States District Court for the Western District of Oklahoma seeking declaratory and injunctive relief against Richard Crisp, Director of Oklahoma's Alcoholic Beverage Control Board. They argued that application of the advertising ban to cable carriage of out-of-state broadcast signals violated the Commerce and Supremacy Clauses, their free speech rights under the First and Fourteenth Amendments, and the Equal Protection Clause of the Fourteenth Amendment. On cross motions for summary judgment, the district court issued a permanent injunction barring enforcement of the Oklahoma law against petitioners. Applying the test set forth in *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n*, 447 U.S. 557 (1980),

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[2] The Oklahoma Supreme Court has found enforcement of the law against television stations to be consistent with the Commerce Clause of the United States Constitution. *Oklahoma Alcoholic Beverage Control Board* v. *Heublein Wines, Int'l*, 566 P.2d 1158 (Okla. 1977).

[3] Op. Okla. Att'y Gen. No. 79-334 (Mar. 19, 1980). Because beverages containing less than 3.2% alcohol may be advertised, and because beer may sometimes contain less than 3.2% alcohol, beer commercials need not be deleted (Pet. App. 3a). At the time this case was brought, hard liquor generally was not advertised on television.

the court held that the ban on liquor advertising was an unconstitutional restriction on the cable operators' First and Fourteenth Amendment right to engage in protected commercial speech. Pet. App. 33a-50a.[4] The court of appeals reversed, holding that, although the advertising at issue was protected by the First Amendment, the Oklahoma ban was a valid restriction on commercial speech (Pet. App. 20a, 24a).[5] The court recognized that its ruling placed cable broadcasters "in a difficult position"; however, the court did not address the preemptive effects of federal law on the Oklahoma advertising ban, noting only that "nothing in the First Amendment prohibits" the state proscription (*id.* at 23a).[6]

INTRODUCTION AND SUMMARY OF ARGUMENT

Oklahoma's prohibition of liquor advertisements, as applied to cable television transmissions, would have a serious adverse effect on the national system of cable television communications. Because federal copyright

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[4] The district court found that (1) cable systems import broadcast signals that originate outside Oklahoma and contain wine commercials; (2) federal law prohibits cable operators from modifying those signals; (3) cable operators "have no contractual relationship with the stations whose signals they carry, pay no fee to the stations for said signals, and have no voice in the programming carried by such stations"; (4) there is no feasible way for cable operators to delete advertising from imported signals; and (5) inability to carry out-of-state signals containing wine commercials "would probably cause a large but inherently immeasurable reduction in Plaintiffs' subscriber revenue" (Pet. App. 40a-42a).

[5] The court of appeals viewed this Court's summary dismissal of the appeal in *Queensgate Investment Co.* v. *Liquor Control Commission*, No. 81-2174 (Oct. 4, 1982), as controlling the result in the instant proceeding (Pet. App. 24a). In *Queensgate*, the Ohio Supreme Court upheld as consistent with the First and Fourteenth Amendments a partial ban on off-premises advertising of liquor prices by certain liquor permit holders. *Queensgate Investment Co.* v. *Liquor Control Commission*, 69 Ohio St. 2d 361, 433 N.E.2d 138 (1982).

[6] On April 4, 1983, the court of appeals stayed its mandate pending this Court's final disposition of the case (Pet. App. 27a).

law, FCC rules, and technical factors prohibit the deletion of advertisements from broadcast signals and other video programs transmitted by cable systems, Oklahoma's ban on liquor advertising will effectively prevent Oklahoma cable systems from retransmitting out-of-state programs to their subscribers. If allowed to stand, the court of appeals' decision will interfere with the FCC's regulatory authority, disrupt the nationwide cable television communications system, and diminish the diversity of broadcast voices available in Oklahoma, in direct contravention of federal statutory and regulatory policy.

I. Twenty-first Amendment considerations momentarily aside, Oklahoma's ban on liquor advertising is unquestionably preempted by federal law insofar as it is applied to transmission of out-of-state programming carried by Oklahoma cable television systems.

A. The federal intention to preempt state regulation of the content of cable advertising is explicit. The Commission has established a comprehensive and exclusive regulatory scheme, expressly preempting nonfederal restrictions on the "operational aspects" of cable television, including all "signal carriage regulation." *Clarification of Cable Television Rules*, 46 F.C.C.2d 175, 178 (1975); see *First Report and Order in Docket No. 18397*, 20 F.C.C. 2d 201, 223 (1969). The Commission's exclusive regulatory jurisdiction over program offerings comprises advertising as well as other programming (see *Second Report and Order in Docket No. 14895*, 2 F.C.C.2d 725, 756 (1966)), and nonbroadcast (or cablecast) programming as well as broadcast-originated signals. See *Clarification of CATV First Report as to Scope of Federal Preemption*, 20 F.C.C.2d 741 (1969); *Time-Life Broadcast, Inc.*, 31 F.C.C. 2d 747 (1971).

B. The Oklahoma provision directly conflicts with the specific regulatory scheme erected by Congress and the Commission. Compliance with Oklahoma's ban on wine commercials would make it impossible for cable operators to comply with the nondeletion requirements of the

Copyright Act and of federal regulations, as well as with the Commission's rules requiring the carriage of signals from nearby local broadcast stations. Moreover, compliance would be technically impracticable given the structure of the industry as it has developed under federal regulation.

C. The Oklahoma provision, if enforced, would significantly interfere with achievement of the purposes and objectives of national cable communications policy, as established by Congress and the Commission. It would significantly diminish the access of Oklahoma residents to the broad range of programming intended to be available on a nationwide basis.

II. The regulations that produce this preemptive effect on Oklahoma's prohibition of liquor advertising as it applies to cable television are a valid exercise of the broad authority delegated to the Commission under the Communications Act of 1934. As such, they must prevail over conflicting state laws.

III. The Twenty-first Amendment's grant of enhanced authority to the states over the sale and importation of alcoholic beverages does not alter this conclusion. The Twenty-first Amendment does not displace all federal law that has an effect on the sale of liquor. Here, the State's liquor regulation has a direct, significant, and adverse effect on the cable television industry—an unrelated industry which it is the policy of Congress to foster and encourage.

ARGUMENT

I. REGULATION OF OUT-OF-STATE ADVERTISING TRANSMITTED OVER CABLE TELEVISION IS PREEMPTED BY FEDERAL LAW

The preemption of state laws, especially those touching on the area of heightened state authority under the Twenty-first Amendment, is not lightly inferred. In this case, however, the State of Oklahoma has purported to require operators of cable television systems to do what

they cannot and may not do under the federal regulatory scheme. In light of the Commission's unambiguous intent to preempt such state laws, the inconsistency between the Oklahoma law and the federal scheme, and the severe adverse consequences to the nation's system of cable communications, the Oklahoma provision at issue cannot stand. Cf. *Head* v. *New Mexico Board of Examiners in Optometry*, 374 U.S. 424 (1963).[7]

A. The Commission has expressly preempted this form of state regulation

"It is well established that within constitutional limits Congress may preempt state authority by so stating in

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[7] In *Head*, this Court concluded that FCC radio broadcasting regulations did not preempt the state's authority to ban price-related eyeglass advertising. As we demonstrate below, the state and federal laws at issue here are in every material respect distinguishable from those in *Head*: the Commission's preemptive intent is explicit and unambiguous; the conflict between state and federal law is irreconcilable; and the state law, if enforced, would seriously interfere with achievement of federal policy. The differences between broadcast and cable regulation, reflected in *Head* and the instant case, arise from differences in the technical structure and economic role of the broadcast and cable industries. Generally speaking, cable operators, unlike broadcasters, retransmit programming verbatim from a wide variety of sources simultaneously. Cable operators typically have no means for deleting specified types of commercial advertising, and were they to do so, it would injure the economic interests of program originators protected under copyright law, FCC rule, and contract. These distinctions between broadcast and cable remain at the heart of FCC regulatory policy. See 48 Fed. Reg. 49855 (1983) (suggesting that local laws prohibiting alcoholic beverage advertising over radio may be enforced by local authorities). The Oklahoma Attorney General, however, failed to recognize any legally relevant differences between these media:

> There is no reason to believe that cable television should be treated any differently than regularly broadcast television. Furthermore, distinctions between cable television and regularly broadcast television if any, are issues of fact not properly addressed by an Attorney General's Opinion.

Op. Okla. Att'y Gen. No. 79-334, at 3.

express terms." *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation and Development Comm'n*, No. 81-1954 (Apr. 20, 1983), slip op. 11. See *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525 (1977). As in *Fidelity Federal Savings & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 154 (1982), the federal "intent to preempt" state regulation of the content of cable advertising "is unambiguous." The Commission has adopted a regulatory system for cable television of "deliberately structured dualism" (*Cable Television Report and Order in Docket No. 18397*, 36 F.C.C.2d 143, 207, on reconsideration, 36 F.C.C.2d 326 (1972), aff'd *sub nom. American Civil Liberties Union* v. *FCC*, 523 F.2d 1344 (9th Cir. 1975)), permitting state authorities to regulate the narrowly-defined local incidents of cable television, while preempting all nonfederal regulation of other matters. See *Report and Order in Docket No. 20272*, 54 F.C.C.2d 855, 861 (1975). "The ultimate dividing line," the Commission has determined, "rests on the distinction between reasonable regulations regarding use of the streets and right-of-way and the regulation of the operational aspects of cable communications" (*ibid.*). The "operational aspects of cable communications"—explicitly preempted—include "signal carriage, pay cable, leased channel regulations, technical standards, * * * and several aspects of franchise responsibility" (*id.* at 863). The state and local role in this scheme involves "the non-operational aspects of cable franchising including bonding agreements, maintenance of rights-of-ways, franchisee selection and conditions of occupancy and construction" (*ibid.*).[8]

The Commission has left no doubt that its assertion of exclusive federal regulatory authority over the "operational aspects" of cable television precludes any state regulation of carriage of television broadcast signals:

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[8] The Commission has allowed state and local franchising authorities to impose certain additional "affirmative obligations," not inconsistent with federal regulatory policies, now including, for example, requirements for public access channels. See *First Report and Order in Docket No. 18397*, 20 F.C.C. 2d at 223 n.28.

"The fact that this Commission has pre-empted jurisdiction of any and all signal carriage regulation is unquestioned. * * * Franchising authorities do not have any jurisdiction or authority relating to signal carriage." *Clarification of Cable Television Rules*, 46 F.C.C.2d at 178.[9] The Commission's exclusive regulatory jurisdiction over program offerings extends to advertising as well as other programming (see *Second Report and Order in Docket No. 14895*, 2 F.C.C.2d at 756), and to nonbroadcast (or cablecast) as well as retransmitted broadcast programming. *Community Cable TV, Inc.*, No. 83-525 (FCC Nov. 15, 1983), slip op. 13; *Clarification of CATV First Report as to Scope of Federal Preemption*, 20 F.C.C.2d 741 (1969); *Time-Life Broadcast, Inc.*, 31 F.C.C.2d 747 (1971). The Commission has accordingly preempted regulation of the "rates, terms and conditions" of video program services provided by cable systems, including origination programming,[10] pay programming,[11] and other video auxiliary services.[12] The

[9] The Commission has chosen not to exercise control over the programming decisions of cable operators, preferring "to afford a period of free experimentation and innovation." *First Report and Order in Docket No. 18397*, 20 F.C.C.2d at 214; see *Brookhaven Cable TV, Inc.* v. *Kelly*, 573 F.2d 765 (2d Cir. 1978), cert. denied, 441 U.S. 904 (1979). However, the conflict between state and federal law does not "evaporate" merely because federal law is permissive in nature. *Fidelity Federal Savings & Loan Ass'n*, 458 U.S. at 155. Just as the Federal Home Loan Bank Board in *Fidelity Federal* explicitly preempted state due-on-sale clauses in order to protect the flexibility and discretion of federal savings and loan institutions (*ibid.*), here the Commission has explicitly preempted nonfederal regulation of operational aspects of cable systems in order to promote, inter alia, innovation and experimentation. *First Report and Order in Docket No. 18397*, 20 F.C.C.2d at 214, 223.

[10] See *Time-Life Broadcast, Inc.*, 31 F.C.C.2d 747 (1971).

[11] See *Clarification of Cable Television Rules*, 46 F.C.C.2d at 199-200; *Report and Order in Docket No. 20272*, 54 F.C.C.2d at 861-863; *Notice of Inquiry in Docket No. 20767*, 58 F.C.C.2d 915, 915-916 (1976); *Brookhaven Cable TV, Inc.* v. *Kelly*, 573 F.2d 765 (2d. Cir. 1978), cert. denied, 441 U.S. 904 (1979).

[12] *Community Cable TV, Inc.*, No. 83-525 (FCC Nov. 15, 1983).

purpose of its regulatory scheme, the Commission has declared, is to ensure "that the benefits of cable communications become a reality on a nationwide basis." *Report and Order in Docket No. 20272*, 54 F.C.C.2d at 865.

The Oklahoma advertising ban plainly exceeds the regulatory authority reserved to the states under this system, and invades the exclusive jurisdiction of the Commission over operational aspects of cable television.[13] Oklahoma retains authority over franchise selection, rights of way, conditions of occupancy or construction, financial responsibility, and the like; but the State may not "interfer[e] with federally authorized CATV origination and advertising." *Time-Life Broadcast, Inc.*, 31 F.C.C.2d at 747.

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[13] In a recent Memorandum Opinion and Order addressing the preemptive effect of federal cable regulation, the Commission reiterated its understanding of preemption in precisely the circumstances of this case:

> While this proceeding is directed primarily to issues involving state or local rate controls, we remain concerned with other types of regulations that may impede new cable services and burden interstate communications. State controls over advertising on cable channels distributed by space satellite may both undercut the economic base for such services and render their operation on an interstate basis a practical impossibility. We have in the past stated that local franchise provisions or regulations that prohibit advertising in a manner consistent with our rules are preempted. *Federal Preemption of CATV Regulations*, [20 F.C.C.2d 741 (1969)]. The types of regulation promulgated by the state of Oklahoma in *Oklahoma Telecasters Ass'n* v. *Crisp*, 699 F.2d 490 (10th Cir. 1983), *petition for cert. filed sub. nom Capital Cities Cable, Inc.* v. *Crisp*, No. 82-1795, would thus undermine the goals of preemption articulated by the Commission in this and earlier cases.

Community Cable TV, Inc., No. 83-525 (FCC Nov. 15, 1983), slip op. 14 n.26. A copy of this Memorandum Opinion and Order has been lodged with the Clerk of this Court. As shown in text, this is merely a restatement of longstanding FCC policy. Cf. *Fidelity Federal Savings & Loan Ass'n*, 458 U.S. at 155.

That the preemption of Oklahoma's ban on liquor advertising over cable television derives from the regulatory policy of the Commission rather than directly from an Act of Congress does not affect this conclusion. As this Court stated in *Fidelity Federal Savings & Loan Ass'n*, 458 U.S. at 153-154:

> Federal regulations have no less pre-emptive effect than federal statutes. Where Congress has directed an administrator to exercise his discretion, his judgments are subject to judicial review only to determine whether he has exceeded his statutory authority or acted arbitrarily.

See also *Blum* v. *Bacon*, 457 U.S. 132 (1982); *Free* v. *Bland*, 369 U.S. 663, 668 (1962); *United States* v. *Shimer*, 367 U.S. 374, 381-382 (1961).

B. The Oklahoma ban on liquor advertising directly conflicts with federal regulations

Even aside from general federal preclusion of state regulation of the operational aspects of cable television, the Oklahoma ban on liquor advertising conflicts with specific regulatory rules and policies of Congress and the Commission.

First, Oklahoma's ban on liquor advertising, as it applies to cable retransmission of broadcast signals, directly conflicts with nondeletion requirements of the Copyright Act of 1976, 17 U.S.C. 111(c),[14] and similar FCC regulations. The Copyright Act establishes a compulsory licensing system for the carriage of television broadcast signals by cable systems. Section 111(c)(3) of the Copyright Act, 17 U.S.C. 111(c)(3), requires cable systems, in order to avail themselves of the benefits of

[14] This Court held in *Goldstein* v. *California*, 412 U.S. 546, 556-560 (1973), that although states had not relinquished exclusive power to the federal government to grant copyright protection, where state and federal laws were in conflict, the federal law would prevail.

the statutory scheme,[15] to carry broadcast signals intact, without deleting any material, including advertisements.[16] This requirement is designed to protect the advertiser, and thus the copyright holder, since the latter's compensation "is directly related to the size of the audience that the advertiser's message is calculated to reach." H.R. Rep. 94-1476, 94th Cong., 2d Sess. 94 (1976). The statute also protects broadcasters by preventing a cable system from inserting advertising without having to bear the same program costs that broadcasters must bear (*ibid.*).

A similar prohibition against the deletion of advertisements from retransmitted signals is contained in the Commission's rules (47 C.F.R. 76.55(b)):

> Where a television broadcast signal is carried by a community unit, pursuant to the rules in this subpart, the programs broadcast shall be carried in full, without deletion or alteration of any portion except as required by this part.

This nondeletion principle applies to commercial advertisements as well as regular programming. See *Garland B. Pugh*, 68 F.C.C.2d 997, 999 (1978); *WAPA-TV Broadcasting Corp.*, 59 F.C.C.2d 263, 272 (1976); *Notice of Proposed Rulemaking and Notice of Inquiry in Docket No. 18397*, 15 F.C.C.2d 417, 444 (1968); *Second Report*

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[15] Cable operators are permitted under the Copyright Act's "compulsory license" scheme to retransmit any broadcast signal without making individual arrangements with the broadcast licensee. Instead, cable systems make payments to a royalty pool which is then divided among broadcasters. 17 U.S.C. 111(d). The compulsory license system was created in order to enable cable systems to carry *signals without having to negotiate* with every copyright owner whose work the cable operator retransmitted. Congress considered such individual negotiations unfeasible. H.R. Rep. 94-1476, 94th Cong., 2d Sess. 89 (1976).

[16] The Act contains a minor exception, not applicable here, for "those engaged in television commercial advertising market research." 17 U.S.C. 111(c)(3).

and Order in Docket No. 14895, 2 F.C.C.2d at 753, 756. The policy "is designed to prevent a loss of revenues to local broadcasters sufficient to result in reduced service to the public." *Garland B. Pugh*, 68 F.C.C.2d at 999.[17]

The Oklahoma provision at issue directly conflicts with these prohibitions. Indeed, the deletion of advertisements is precisely the practice the federal rules are directed against. The economics of programming and broadcasting are such that to permit cable operators to delete advertising would disrupt the system of payments and incentives needed to stimulate the business and reward production. That the purpose of Oklahoma's liquor advertising ban is not to interfere with the federal scheme is immaterial (*Perez* v. *Campbell*, 402 U.S. 637, 651 (1971)); the effect (to the extent that compliance is even technologically feasible)[18] is to allow—indeed, to compel—Oklahoma cable operators to receive the benefits of nationwide programming without carrying a portion of the advertising that pays for it. Since compliance with both federal and state law is a legal impossibility the state law must yield. *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142-143 (1963); *Farmers Union* v. *WDAY, Inc.*, 360 U.S. 525, 531-535 (1959).

Second, the advertising ban conflicts with the Commission's so-called "must carry" rules. In order to protect local television programming and broadcasting, the Commission adopted rules in 1965 requiring certain cable systems to carry all television signals that were available over the air in their service area (the "must carry" rules), and to delete certain imported programming that

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[17] Although a specific rule of this sort was first adopted in 1972 (*Cable Television Report and Order in Docket No. 18397, 36 F.C.C.2d* at 230), the Commission had indicated as early as 1966 that its signal carriage requirements embraced an implicit prohibition against any deletion or alteration of any portion (including advertising) of signals carried. See *Second Report and Order in Docket No. 14895*, 2 F.C.C.2d at 756.

[18] See pages 16-17, *infra*.

duplicated local programs (the "nonduplication" rules).[19] *First Report and Order in Docket No. 14895*, 38 F.C.C. 683 (1965), aff'd *sub nom. Black Hills Video Corp.* v. *FCC*, 399 F.2d 65 (8th Cir. 1968). In 1966 the Commission extended these rules to all cable systems and also imposed substantial restrictions on the importation of distant television signals by cable systems (the "distant signal" rules). *Second Report and Order in Docket No. 14895*, 2 F.C.C.2d at 725. These rules were designed to ensure that cable subscribers would continue to receive all available local signals, that the relative competitive positions of the stations in the area would be preserved, and that the system of local broadcasting created by the Commission under Section 307(b) of the Communications Act would not be jeopardized by competition from cable systems. *Second Report and Order in Docket No. 14895*, 2 F.C.C.2d at 735-736.[20]

In 1972 the Commission promulgated a comprehensive scheme of regulation for cable television systems that included, in addition to other regulations, "must carry," "distant signal" and "nonduplication" rules of the type described above. *Cable Television Report and Order in Docket No. 18397*, 36 F.C.C.2d 143, on reconsideration, 36 F.C.C.2d 326 (1972), aff'd *sub nom. American Civil Liberties Union* v. *FCC*, 523 F.2d 1344 (9th Cir. 1975). It was as part of this scheme that the Commission

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[19] The nonduplication rules evolved into two different sets of rules, one dealing with network programs and the other with non-network programs. The latter rules were referred to as the "syndicated program exclusivity" rules. See, *e.g.*, *Cable Television Report and Order in Docket No. 18397*, 36 F.C.C.2d at 181-185.

[20] See *Cable Television Report and Order in Docket No. 18397*, 36 F.C.C.2d 143, 164, 165, on reconsideration, 36 F.C.C.2d 326 (1972), aff'd *sub nom. American Civil Liberties Union* v. *FCC*, 523 F.2d 1344 (9th Cir. 1975); *Second Report and Order in Docket No. 14895*, 2 F.C.C.2d 725, 781 (1966), aff'd *sub nom. Black Hills Video Corp.* v. *FCC*, 339 F.2d 65 (8th Cir. 1968); *First Report and Order in Docket No. 14895*, 38 F.C.C.2d 683, 700, 713 (1965). See also *Arlington Telecommunications Corp.*, 70 F.C.C.2d 2291, 2298-2299 (1979).

adopted the "deliberately structured dualism" (see page 8, *supra*) that permits state authorities to regulate the local incidents of cable television service while preempting regulation of operational aspects of cable systems. See *Cable Television Report and Order in Docket No. 18397*, 36 F.C.C.2d at 207.

The "must carry" rules are still in effect today, although in somewhat modified form. See 47 C.F.R. 76.51-76.61 (1980).[21] Under these rules, certain cable operators are required to carry the signals of particular television broadcast stations. In particular, cable operators may be required to carry the signals of a broadcast station within a "specified zone" (35 miles) or if the station is "significantly viewed" in the community served by the cable operator. 47 C.F.R. 76.59(a)(1), (5) and (6). The "must carry" rules often require the cable operator to carry signals from a broadcast station in a nearby state. J.A. 22, 35; II R. 34-35, 52-53. Under 47 C.F.R. 76.55(b),[22] the signals must, moreover, be carried with no modifications or deletions, even of commercials.

Oklahoma's ban on liquor advertising over cable directly conflicts with these rules. The Commission staff estimates that approximately one-third of the land area of Oklahoma now receives out-of-state television broadcast signals that are required to be carried under the "must carry" rules. See Television Digest, Inc., *Television & Cable Factbook* 699-717 (1982-1983 ed.). Cable operators required to carry out-of-state signals that include liquor advertisements would face criminal prosecution under state law as a result of compliance with federal require-

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[21] The "distant signal" and "syndicated exclusivity" rules have been rescinded, on a finding that they were no longer necessary to protect the viability of local broadcasting and had come to restrict competition and diversity in programming. *Cable Television Syndicated Program Exclusivity Rules*, 79 F.C.C.2d 663, 813-814 (1980), aff'd *sub nom. Malrite T.V. v. FCC*, 652 F.2d 1140 (2d Cir. 1981), cert. denied, 454 U.S. 1143 (1982). Network nonduplication rules, like "must carry" rules, remain in effect. 47 C.F.R. 76.92-76.99.

[22] Discussed at pages 12-13, *supra*.

ments. This is a textbook case of conflict, compelling a finding of federal preemption. *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. at 142-143; *Farmers Union* v. *WDAY, Inc.*, 360 U.S. at 531-535.

Finally, even for non-broadcast (or cablecast) programming (to which the "must carry" rules, the Copyright Act nondeletion requirements, and the FCC nondeletion requirements do not apply), compliance with the Oklahoma ban on wine commercials as well as federal regulations may well be "'a physical impossibility.'" *Pacific Gas & Electric Co.*, slip op. 11 (quoting *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. at 142-143). Not all cablecasted programming contains advertising—HBO is a well-known example that does not—but it is more common for it to do so. See J.A. 25; II R. 39. Among the advertisements carried are wine commercials (*ibid.*). The Oklahoma advertising ban thus creates a technical difficulty for cablecasting. The district court made a factual finding that "[t]here exists no feasible way for [cable operators] to block out the advertisements" (Pet. App. 41a). See also J.A. 24, 26, 29, 39; II R. 37-38, 40-41, 44, 58.

Unlike television broadcast stations, which are required by FCC regulations to have operators supervise their transmissions (see 47 C.F.R. 73.1860), cable television systems face no such requirement and are often fully automated with no regular operator on duty. Moreover, while a broadcast station transmits only a single signal, a cable system normally transmits a minimum of 12 signals, and often more than 30, simultaneously. Constant monitoring of all of these signals to delete wine commercials as required by the Oklahoma law, even where such deletion is permissible, would be a prohibitively burdensome task. The Congress reached a similar conclusion in adopting the Copyright Act of 1976. A major reason why Congress concluded that imposing full copyright liability on cable systems would be unworkable was that the technical and logistical problems of interposing the necessary personnel and equipment to

block out programs as to which the cable operator had not obtained copyright permission would be insurmountable. See, *e.g.*, *Copyright Law Revisions: Hearings on H.R. 2223 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 94th Cong., 1st Sess., Pt. 1, at 758 (1975); *Copyright Law Revisions: Hearings on S. 1361 Before the Subcomm. on Patents, Trademarks, and Copyrights of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 291-292, 400-401 (1973); *Copyright Law Revisions: Hearings on H.R. 4347, H.R. 5680, H.R. 6831, H.R. 6835, Before Subcomm. No. 3 of the House Comm. on the Judiciary*, 89th Cong., 1st Sess., Pts. 1 & 3, at 36, 1251-1254 (1965).[23]

The Oklahoma provision thus cannot be harmonized with our national cable communications system. Given the structure of the industry, as developed in response to FCC and statutory policies precluding selective deletion of broadcast signals, cable operators are not now able to comply with state laws based on an entirely different premise.

C. The Oklahoma ban on liquor advertising stands as an obstacle to the achievement of the Commission's full purposes and objectives

This Court has frequently reiterated that state law is preempted if it " 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *Pacific Gas & Electric Co.*, slip op. 11 (quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941)); *Fidelity Federal Savings & Loan Ass'n*, 458 U.S. at 153; *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. at 142-143. And, as noted at page 11, *supra*, the preemp-

[23] See also *Cable Television Report and Order in Docket No. 18397*, 36 F.C.C.2d at 165, in which the Commission rejected as technically unfeasible a proposal to allow commercial substitution by cable operators. It is also significant that many cable-originated program distributors, such as CNN, contractually forbid deletion of advertising.

tion doctrine applies to valid federal regulations no less than to Acts of Congress.

In accordance with the broad authorities and policies of the Communications Act of 1934, the Commission has fostered a nationwide system of over-the-air and cable television communications designed to expand the range of voices and programming available to viewers in all parts of the country.[24] The regulatory scheme is intended not merely to protect—but actively to promote—this objective. See *United States* v. *Midwest Video Corp.*, 406 U.S. at 667. "[I]t has long been a basic tenet of national communications policy that 'the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.'" *First Report and Order in Docket No. 18397*, 20 F.C.C.2d at 205 (quoting *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945)). See also *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775, 796-798 (1978). Cable is particularly important as a means of providing television service "in areas too small in population to support a local station or too remote in distance or isolated by terrain to receive regular or good off-the-air reception." *Second Report and Order in Docket No. 14895*, 2 F.C.C.2d 725, 781 (1966), aff'd *sub nom. Black Hills Video Corp.* v. *FCC*, 399 F.2d 65 (8th Cir. 1968). As the record in this case indicates, in many towns of Oklahoma the only available television signals

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[24] The Commission's pursuit of a strong and diverse cable television communications system is grounded in First Amendment, as well as statutory, concerns. See *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 122 (1973). The Commission has regulated cable television signal carriage only where such regulation is believed to be necessary to protect local television service, and even then has fashioned its rules in such a way as to impose "the least possible restrictions on First Amendment freedoms." *Tulsa Cable Television*, 74 F.C.C.2d 382, 385 (1979) (citing *United States* v. *O'Brien*, 391 U.S. 367 (1968)); *Arlington Telecommunications Corp.*, 70 F.C.C.2d 2291, 2299-2300 (1979).

are those of out-of-state stations imported by cable systems. J.A. 37; II R. 55-56.

The Oklahoma provision at issue affects not only the advertising of alcoholic beverages; it also has the effect of banning the carriage of many out-of-state broadcast and cablecast programs by Oklahoma cable operators.[25] Oklahoma cable subscribers will be deprived, for example, of the programming of distant out-of-state stations, including cable "superstations" whose programming has wide national appeal. Further, because carriage of out-of-state broadcast signals is what attracts many subscribers to cable, cable systems are likely to lose much of their appeal, and therefore substantial revenues, as a result of the ban, as the district court found (Pet. App. 42a).[26] If cable systems cease operations or are required to restrict severely the programming that they carry, the public will be denied access not just to retransmitted television broadcast signals, but also to other cable services, including specialty news, public affairs, motion pictures, and sports cable channels. The Oklahoma ban against wine commercials, therefore, threatens a substantial decrease in program availability and diversity for residents of Oklahoma, thus thwarting the national policy favoring the dissemination of information from varied and diverse sources "to all the people of the United States" (47 U.S.C. 151).

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[25] If the Oklahoma advertising ban is enforced, cable operators in that state will be unable to satisfy the requirements for obtaining the compulsory license provided under the Copyright Act. This problem alone would be devastating to their programming because it would require them to undertake the protracted royalty negotiations found infeasible by Congress. H.R. Rep. 94-1476, *supra*, at 89.

[26] See *Malrite T.V.* v. *FCC*, 652 F.2d 1140, 1145 n.4 (2d Cir. 1981). Cf. *Fidelity Federal Savings & Loan Ass'n*, 458 U.S. at 156 ("By further limiting the availability of an option the Board considers essential to the economic soundness of the thrift industry, the State has created 'an obstacle to the accomplishment and execution of the full purposes and objectives' of the due-on-sale regulation. *Hines* v. *Davidowitz*, 312 U.S., at 67.").

II. THE FCC REGULATIONS THAT PREEMPT THE OKLAHOMA PROVISION ARE VALID AND AUTHORIZED BY STATUTE

This Court held in *Fidelity Federal* that when an agency adopts regulations intended to preempt state law, the court's inquiry becomes whether the policy " 'represents a reasonable accommodation of conflicting policies' " and "is within the scope of the [agency's] delegated authority." 458 U.S. at 154 (quoting *United States* v. *Shimer*, 367 U.S. at 383). The FCC rules at issue here easily satisfy that test.

The Commission has been entrusted with "broad authority" over cable television, deriving from Section 2(a) of the Communications Act of 1934, 47 U.S.C. 152(a).[27] *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 178 (1968). The Act has been held to provide a " 'comprehensive mandate', with 'not niggardly but expansive powers' " (*id.* at 173, quoting *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 219 (1943)). This statutory delegation of authority provides a sufficient basis for regulatory action that is "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting" (392 U.S. at 178). The authority is exercised both to protect the "system of local television broadcasting" (*id.* at 177), and to "promote the objectives for which the Commission had been assigned jurisdiction over broadcasting." *United States* v. *Midwest Video Corp.*, 406 U.S. at 667 (plurality opinion). The breadth of the Commission's ancillary powers over cable television was confirmed in *Midwest Video Corp.*, which made clear that the Commission's authority encompassed cable retrans-

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[27] This section provides in relevant part: "The provisions of this [Act] shall apply to all interstate and foreign communication by wire or radio." 47 U.S.C. 152(a). The Communications Act has been held to apply to cable television, even though that technology did not exist at the time of passage of the Act. *United States* v. *Southwestern Cable*, 392 U.S. 157, 167-169 (1968).

mission of television broadcast signals as well as cablecasting (406 U.S. at 653 n.6, 662-663).

The Commission's regulation of cable programming and preemption of conflicting state regulation are designed to serve precisely those objectives identified by this Court in *Southwestern Cable Co.* and *Midwest Video Corp.* as warranting federal regulation of the cable industry. The Commission's initial objective in regulating signal carriage by cable systems was to ensure that the development of cable television would not disrupt the Commission's national television allocation policies. This was plainly within the Commission's authority to take regulatory action that is "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." *Southwestern Cable Co.*, 392 U.S. at 178. The Commission's regulation of cable programming is also designed to serve the objective of increasing program availability and diversity. See *Midwest Video Corp.*, 406 U.S. at 662-670.

Moreover, the Commission's decision to preempt nonfederal regulation of cable programming was a reasonable exercise of the Commission's jurisdiction. The Commission has concluded that its regulation of cable systems is essential "to promote national communications objectives" and that its rules are intended to "assur[e] that the benefits of cable communications become a reality on a nationwide basis." *Report and Order in Docket No. 20272*, 54 F.C.C. 2d at 864-865. Federal preemption is required to enable the cable television industry to develop its "vast potential" (*id.* at 865) free from state or local regulation that might inhibit diversity of offerings or weaken the economic base of the industry. While some may disagree with the Commission's judgment that "the public interest would best be served for the present by encouraging [cable television] to experiment and develop its originations free from * * * limitations as to types of programming" (*First Report and Order in Docket No. 18397*, 20 F.C.C.2d at 205), that judgment is plainly within the scope of the Commission's charter to promote

a "rapid, efficient, Nationwide and world-wide wire and radio communications service." 47 U.S.C. 151. When a federal agency has adopted reasonable regulations within its authority, as the Commission has done here, a conflicting state law such as Oklahoma's must yield. *Fidelity Federal Savings & Loan Ass'n*, 458 U.S. at 153-154; *Free* v. *Bland*, 369 U.S. 663, 666 (1962).

III. THE AUTHORITY GRANTED THE STATES BY THE TWENTY-FIRST AMENDMENT TO REGULATE THE IMPORTATION OF ALCOHOLIC BEVERAGES DOES NOT VALIDATE OKLAHOMA'S ADVERTISING BAN

As set forth above, the application of Oklahoma's advertising ban to cable broadcasters is preempted by valid federal regulations designed to foster the nation's cable communications system. The state's authority under the Twenty-first Amendment to control the "transportation or importation" of intoxicating liquors does not alter this result.[28]

The states admittedly have broad power under the Twenty-first Amendment to regulate commerce in intoxicating liquors within their borders. See *State Board of Education* v. *Young's Market Co.*, 299 U.S. 59, 64 (1936). But the "added presumption in favor of the validity of the state regulation in this area" (*California* v. *LaRue*, 409 U.S. 109, 118 (1972)) is not without limits. The Amendment did not pro tanto repeal the Constitution with respect to state liquor regulation, but rather "primarily created an exception to the normal operation of the Commerce Clause." *Craig* v. *Boren*, 429

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[28] Section 2 of the Twenty-first Amendment provides:

> The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

U.S. 190, 206 (1976). See, *e.g.*, *Hostetter* v. *Idlewild Liquor Corp.*, 377 U.S. 324, 330 (1964); *Carter* v. *Virginia*, 321 U.S. 131, 139-140 (1944) (Frankfurter, J., concurring); *Joseph S. Finch & Co.* v. *McKittrick*, 305 U.S. 395, 398 (1939).[29]

Even as to the Commerce Clause, the Amendment does not preclude all federal regulation. *Hostetter* v. *Idlewild Liquor Corp.*, *supra*; *Nippert* v. *City of Richmond*, 327 U.S. 416, 425 n.15 (1946); *William Jameson & Co.* v. *Morgenthau*, 307 U.S. 171 (1939) (per curiam). As this Court has explained, "the Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system. Although States retain substantial discretion to establish other liquor regulations, those controls may be subject to the federal commerce power in appropriate situations." *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980).

In analyzing the impact of the Twenty-first Amendment on state regulations, therefore, this Court has distinguished between the scope of a state's authority to act under the so-called "dormant" or "negative" Commerce Clause (*e.g.*, *Joseph E. Seagram & Sons, Inc.* v. *Hostetter*, 384 U.S. 35, 41-45 (1966); *State Board of Education* v. *Young's Market Co.*, *supra*), and the resolution of conflicts under the Supremacy Clause (*California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, *supra*). The Court has recognized that the states have wide lati-

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[29] The Court has concluded that a "State may not exercise its power under the 21st Amendment in a way which impinges upon the Establishment Clause of the First Amendment" (*Larkin* v. *Grendel's Den, Inc.*, No. 81-878 (Dec. 13, 1982), slip op. 6 n.5), nor does the Amendment permit a state to "alter the application of equal protection standards that otherwise govern" (*Craig* v. *Boren*, 429 U.S. at 209-210) or dilute the due process requirements of the Fourteenth Amendment (*Wisconsin* v. *Constantineau*, 400 U.S. 433, 436 (1971)). See also *Department of Revenue* v. *James Beam Distilling Co.*, 377 U.S. 341 (1964) (state may not tax imported liquor in violation of the Export-Import Clause).

tude to regulate the distribution of alcoholic beverages within their borders, virtually unrestrained by the "dormant" Commerce Clause; however, the Court has yet to sustain a state regulation under the Twenty-first Amendment in the face of an actual conflicting federal law otherwise entitled to preemptive effect under the Supremacy Clause. See *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc., supra*; *Collins* v. *Yosemite Park & Curry Co.*, 304 U.S. 518 (1938); cf. *Joseph E. Seagram & Sons, Inc.* v. *Hostetter*, 384 U.S. at 45 (finding "no such clear conflict" between state and federal laws).

Here, there is unquestionably a conflict between state and federal law. Accordingly, resolution of this case entails a "pragmatic effort to harmonize state and federal powers." *California Retail Liquor Dealers Ass'n*, 445 U.S. at 109. However, the analysis need not necessarily reduce to an ad hoc comparison of the interests to be served by the conflicting federal and state laws. Section 2 of the Twenty-first Amendment has one narrow though important purpose: it was "designed *only* to augment the powers of the States to regulate the importation of liquor destined for use, distribution, or consumption in its own territory." *United States* v. *State Tax Commission*, 412 U.S. 363, 378 (1973) (emphasis added) (citing *Collins* v. *Yosemite Park & Curry Co.*, 304 U.S. at 538); see *United States* v. *Frankfort Distilleries, Inc.*, 324 U.S. 293, 299 (1945).[30]

This purpose suggests both geographical and substantive limitations on the Twenty-first Amendment powers of the states vis-a-vis otherwise preemptive federal laws.

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[30] "In determining state powers under the Twenty-first Amendment, the Court has focused primarily on the language of the provision rather than the history behind it. In terms, the Amendment gives the States control over the 'transportation or importation' of liquor into their territories." *California Retail Liquor Dealers Ass'n*, 445 U.S. at 106-107 (citation omitted; footnote omitted).

This Court has recognized that the states have no enhanced authority under the Twenty-first Amendment to regulate the importation or transportation of alcoholic beverages outside their boundaries—in sister states or federal enclaves. *State Tax Commission*, 412 U.S. at 378. We urge the Court to recognize a parallel limitation with respect to the nature of the industries or transactions that are the subject of the federal-state conflict. We submit that there should be a strong presumption in favor of enforcing federal provisions that govern the conduct of parties not directly involved in the distribution of alcoholic beverages. State authority over "how to structure the liquor distribution system" (*California Retail Liquor Dealers Ass'n*, 445 U.S. at 110) should not " 'increase [the states'] jurisdiction' " (*State Tax Commission*, 412 U.S. at 378 (citation omitted)) over other activities in interstate commerce—especially not over entities lacking any economic interest in or contractual relationship with the business of liquor distribution. A state may not prohibit importation of pretzels merely because they whet the appetite for beer.

We do not dispute that, pursuant to its authority under the Twenty-first Amendment, a state may impose reasonable restraints on advertising by those who sell liquor, such as liquor permit holders. See *Queensgate Investment Co.* v. *Liquor Control Commission*, No. 81-2174 (Oct. 4, 1982).[31] But, unlike the restriction at issue in *Queensgate*, which prevented certain liquor permit holders from advertising prices outside their business premises, the advertising ban at issue here is directed at an entirely separate industry—cable television—that has no

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[31] *New York State Liquor Authority* v. *Bellanca*, 452 U.S. 714 (1981), and *California* v. *LaRue*, 409 U.S. 109 (1972), both of which concerned state regulations governing lewd dancing and similar conduct in bars and cocktail lounges, are thus distinguishable. The regulations in *Bellanca* and *LaRue* were directed exclusively at liquor permit holders, and conflicted with no federal statutes or regulations.

relevant contractual relationship to the liquor industry and indeed no economic interest in liquor advertising.[32] Moreover—and critically for purposes of this controversy—the industry to which the ban is applied is fostered and encouraged under and, for these purposes, exclusively regulated by federal law. The Twenty-first Amendment was not intended to limit the power of Congress to delegate to a federal agency exclusive authority to regulate the communications industry.

Even if the Court is not willing to adopt at this time a categorical presumption in favor of the supremacy of valid federal regulations governing industries not directly involved in liquor distribution, it seems beyond doubt that the federal interests at stake in this controversy far outweigh any marginal benefit the State may reap in its efforts to dampen the demand for alcoholic beverages. The Commission's regulation of cable television is vital to achievement of a diverse and economically healthy national communications system. Oklahoma's ban on liquor advertising, as applied to the cable industry, would impede these objectives and effectively deny the benefits of cable television to many of the residents of the State. As discussed in Part I, *supra*, because of economic considerations and the Commission's "must carry" rules a cable broadcaster cannot simply delete all out-of-state broadcast signals from its service, nor can it block out wine commercials without losing its compulsory license under the Copyright Act and violating applicable Commission regulations. Therefore, in the understated prose of the court of appeals, the state advertising ban indeed places cable broadcasters in a "difficult position" (Pet. App. 23a)—directly between the

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[32] Cable broadcasters do not derive revenues from the advertisements contained in the signals they import. Thus, it makes no economic difference to a cable broadcaster whether, at any given time, an imported television program contains oven cleaner or wine commercials. See Pet. App. 40a; J.A. 29; II R. 44-45.

twin disasters of economic ruin and state criminal prosecution.

The detrimental impact on cable broadcasters of a decision in favor of the State, moreover, would not be limited to Oklahoma. A diminished national market for cable services necessarily decreases the resources available for national programming. Moreover, should other states adopt similar or conflicting liquor advertising restrictions, the cable broadcast copyright scheme envisioned by Congress would be progressively gutted; the resulting financial and practical dislocations could well render an "efficient, Nation wide" cable broadcasting system unattainable. 47 U.S.C. 151, 152(a).

The federal concerns that undergird the preemption of Oklahoma law in this case are thus "both familiar and substantial." *California Retail Liquor Dealers Ass'n*, 445 U.S. at 110. For almost fifty years, the Commission has been charged with fostering a nationwide system of communications, capable of reaching persons throughout the land. In so doing, the Commission has found it expedient to preclude state and local control over cable television operations, including their carriage of commercial advertisements. Oklahoma's undoubted "control over whether to permit importation or sale of liquor and how to structure the liquor distribution system" (*id.* at 110) simply does not justify the provision at issue.[33]

The Supremacy Clause of the Constitution, therefore, requires reversal of the decision below, notwithstanding the state's authority under the Twenty-first Amendment. "The relative importance to the State of its own law is not material when there is a conflict with a valid federal

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[33] Oklahoma could easily exempt cable transmission of out-of-state signals from its ban, just as it has exempted print media imported into the State. Pet. App. 5a n.1, 23a-24a. See *Dunagin* v. *City of Oxford*, No. 80-3762 (5th Cir. Oct. 31, 1983), slip op. 473-474 (Mississippi's ban on liquor advertising has been interpreted by the State as not requiring interruption or deletion of out-of-state wine commercials transmitted by cable television).

law, for the Framers of our Constitution provided that the federal law must prevail." *Free* v. *Bland*, 369 U.S. at 666. See also *Fidelity Federal Savings & Loan Ass'n*, 458 U.S. at 153 (standard preemption principles not inapplicable merely because an area of special importance to the state is involved).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

PAUL M. BATOR
Deputy Solicitor General

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RICHARD G. WILKINS
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Federal Communications Commission

NOVEMBER 1983

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

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SUPREME COURT, U.S.

No. 82-1795

CAPITAL CITIES CABLE, INC., ET AL., PETITIONERS

v.

RICHARD A. CRISP, DIRECTOR, OKLAHOMA ALCOHOLIC BEVERAGE CONTROL BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MOTION FOR LEAVE TO PARTICIPATE IN ORAL ARGUMENT

Pursuant to Rule 38 of the Rules of this Court the Solicitor General requests that the Federal Communications Commission be allotted an additional 15 minutes to present oral argument in this case in support of petitioners. Petitioners have declined our request to cede the Commission any of their argument time for this purpose. In the alternative, we request that the time allotted to petitioners be divided so as to allot 15 minutes to petitioners and 15 minutes to the Commission.

This case presents the question whether a state's ban on liquor advertising, as applied to cable retransmission of out-of-state broadcast signals, is preempted by federal law or is in conflict with the First Amendment commercial speech doctrine. The Commission has a substantial interest in the question of preemption raised in this case, because of its responsibility for fostering a "rapid, efficient, Nationwide, and world-wide wire and radio communications service." 47 U.S.C. 151, 152(a). The Commission has found it expedient to preempt nonfederal regulation of the content of cable programming, including

advertising, has prohibited the deletion of advertising from cable retransmissions of broadcast signals, and has required, under certain circumstances, the retransmission of out-of-state broadcast signals over cable systems without deletion or modification. The state law at issue in this case is incompatible with the Commission's regulatory decisions. The case thus raises the important question of the application of otherwise preemptive federal regulations in the face of conflicting state laws enacted pursuant to Section 2 of the Twenty-first Amendment.

Oral presentation of the views of the Commission would be especially appropriate in this case because the issue of preemption, which if decided in favor of petitioners would be dispositive of the case, was not raised in the petition for a writ of certiorari, but was raised by the Commission in its memorandum as amicus curiae. In granting the petition, the Court directed the parties to address the question posed by the Commission: whether the State's regulation of liquor advertising, as applied to out-of-state broadcast signals, is valid in light of existing federal regulation of cable broadcasting. We submit that the Commission is in the best position to assist this Court in obtaining a fuller perspective on the complex regulatory scheme involved in this case, and on the ramifications of the state provision at issue for the national system of cable communications.

Respectfully submitted.

REX E. LEE
Solicitor General

NOVEMBER 1983

In The
Supreme Court of the United States
October Term, 1983

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

CAPITAL CITIES CABLE, INC.; COX CABLE OF OKLAHOMA CITY, INC.; MULTIMEDIA CABLEVISION, INC.; and SAMMONS COMMUNICATIONS, INC., Petitioners,	)	
v.	)	No. 82-1795
RICHARD A. CRISP, DIRECTOR, OKLAHOMA ALCOHOLIC BEVERAGE CONTROL BOARD Respondent.	)	

PETITIONERS' RESPONSE TO
MOTION BY THE SOLICITOR GENERAL
FOR LEAVE TO PARTICIPATE
IN ORAL ARGUMENT

Petitioners support the request by the Solicitor General that the Federal Communications Commission be allotted an additional 15 minutes to present oral argument in this case. Petitioners agree with the Solicitor General that because of the existence of the federal preemption issue, the Commission should be granted additional time.

However, Petitioners oppose the Solicitor General's alternative request that, if additional time is not granted, the time allotted to Petitioners be divided so as to grant 15 minutes to Petitioners and 15 minutes to the Commission. The First Amendment, Twenty-first Amendment and preemption issues present complex interrelationships that must be

explored at oral argument. These novel constitutional issues require the full 30 minutes of oral argument allotted Petitioners.

Respectfully submitted,

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Capital Cities Cable, Inc.

December 1, 1983

CERTIFICATE OF SERVICE

I, Timothy B. Dyk, hereby certify that I have this 1st day of December, 1983, caused one copy of the foregoing Petitioners' Response to Motion by the Solicitor General for Leave to Participate in Oral Argument to be sent by first-class mail, postage prepaid, to the following counsel of record for the Respondent:

James B. Franks, Esq.
Assistant Attorney General
of the State of Oklahoma
112 State Capitol Building
2302 Lincoln Boulevard
Oklahoma City, Oklahoma 73105

I have also on this date caused one copy of the foregoing Response to be sent by first-class mail, postage prepaid, to the following Amicus Curiae:

The Hon. Rex E. Lee
Solicitor General of the
United States
Department of Justice
Washington, D.C. 20530

Timothy B. Dyk

No. 82-1795-CFX
Status: GRANTED

Docketed:
May 3, 1983

Title: Capital Cities Cable, Inc., et al., Petitioners
v.
Richard A. Crisp, Director, Oklahoma Alcoholic Beverage Control Board

Court: United States Court of Appeals for the Tenth Circuit

Counsel for petitioner: Dyk, Timothy B., Rushforth, Brent N.

Counsel for respondent: McDonald, Robert L.

Entry	Date	Note	Proceedings and Orders
1	May 3 1983	G	Petition for writ of certiorari filed.
3	May 31 1983		Order extending time to file response to petition until June 25, 1983.
4	Jun 24 1983		Brief amicus curiae of Amer. Newspaper Pub. Assn. and Magazine Pub. Assn. filed.
5	Jun 27 1983		Brief of respondent in opposition filed.
6	Jun 25 1983		Brief amicus curiae of Natl. Cable Television Assn., Inc., et al. filed.
7	Jun 25 1983		Brief amicus curiae of Oklahoma Press Assn., et al. filed.
9	Jun 25 1983		Brief amicus curiae of Natl. Assn. of Broadcasters filed.
10	Jun 28 1983		Brief amicus curiae of Federal Communications Commission filed.
11	Jun 29 1983		DISTRIBUTED. September 26, 1983
12	Aug 16 1983	X	Reply brief of petitioner Capital Cities Cable, Inc. filed.
13	Oct 3 1983		Petition GRANTED. In addition to the Questions Presented by the petitioners, the parties are directed to brief and argue the following question: Whether the state's regulation of liquor advertising, as applied to out-of-state broadcast signals, is valid in light of existing federal regulation of cable broadcasting. **********
14	Nov 17 1983		Brief amicus curiae of Turner Broadcasting System, Inc. filed.
15	Nov 17 1983		Brief of petitioners Cox Cable of OK City, et al. filed.
16	Nov 17 1983		Joint appendix filed.
17	Nov 17 1983		Brief amicus curiae of Amer. Newspaper Pub. Assn., et al. filed.
18	Nov 17 1983		Brief amicus curiae of Amer. Advertising Fed., et al. filed.
19	Nov 17 1983	G	Motion of National League of Cities for leave to file a brief as amicus curiae filed.
20	Nov 17 1983		Brief of petitioner Capital Cities Cable, Inc. filed.
21	Nov 17 1983		Brief amicus curiae of Natl. Cable Television Assn., et al. filed.
22	Nov 17 1983		Brief amicus curiae of Natl. Assn. of Broadcasters, et al. filed.
23	Nov 17 1983		Brief amicus curiae of American Civil Liberties Union filed.
24	Nov 17 1983		Brief amicus curiae of Federal Communications Comm. filed.
25	Nov 28 1983		Motion of National League of Cities for leave to file a brief as amicus curiae GRANTED.

No. 82-1795-CFX

Entry	Date	Note	Proceedings and Orders
26	Nov 23 1983	D	Motion of petitioners for divided argument filed.
27	Nov 25 1983		Record filed.
28	Nov 25 1983		Certified original record & C. A. proceedings received.
29	Nov 30 1983	D	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae, for divided argument and for additional time for oral argument filed.
30	Dec 2 1983		Response of petitioners' to motion of Solicitor General for leave to participate in oral argument filed.
40	Dec 12 1983		Motion of petitioners for divided argument DENIED.
41	Dec 12 1983		Motion of the Solicitor General for leave to participate in oral DENIED.
42	Dec 15 1983		Brief amicus curiae of State of Mississippi filed.
43	Dec 28 1983		Brief of respondent Crisp, Richard A. filed.
44	Dec 28 1983		Brief amicus curiae of S.A.N.E., Inc. filed.
45	Jan 9 1984		SET FOR ARGUMENT. Tuesday, February 21, 1984. (4th case)
46	Jan 11 1984		CIRCULATED.
47	Jan 4 1984	D	Motion of petitioners Cox Cable of Oklahoma City, Inc., et al. for assignment of counsel for oral argument filed.
48	Jan 10 1984		Opposition of petitioner Capital Cities Cable, Inc. to motion of petitioners Cox Cable of Oklahoma City, Inc., et al. for assignment filed.
50	Jan 27 1984	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
51	Jan 27 1984	G	Motion of The Solicitor General to permit Michael W. McConnell, Esquire, to present oral argument pro hac vice on behalf of the Federal Communications Commission as amicus curiae filed.
52	Jan 23 1984		Motion of petitioners Cox Cable of Oklahoma City, Inc., et al. for assignment of counsel for oral argument DENIED.
53	Feb 7 1984	X	Reply brief of petitioner Capital Cities Cable, Inc. filed.
54	Feb 10 1984	X	Reply brief of petitioners Cox Cable of OK City, et al. filed.
55	Feb 21 1984		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
56	Feb 21 1984		Motion of The Solicitor General to permit Michael W. McConnell, Esquire, to present oral argument pro hac vice on behalf of the Federal Communications Commission as amicus curiae GRANTED.
57	Feb 21 1984		ARGUED.